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In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

KINGDOM OF SPAIN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 508 (1998), this Court ruled that the meaning of "abandoned" under the Abandoned Shipwreck Act conforms with its meaning under admiralty law, but did not explain what admiralty law says on the issue. Accordingly, this case presents the following question:

What standard of abandonment does admiralty law apply to ancient shipwrecks recently-discovered and embedded in the submerged lands of a State?

LIST OF PARTIES

The parties to the proceedings below were the Commonwealth of Virginia, Sea Hunt, Inc., and the Kingdom of Spain. The only corporate entity before this Court is Sea Hunt, Inc.

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PETITION FOR WRIT OF CERTIORARI

The Commonwealth of Virginia respectfully petitions this Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit, which decided that two recently-discovered, ancient shipwrecks embedded in submerged lands of Virginia belong to the Kingdom of Spain and not to the Commonwealth.[1]

OPINIONS BELOW

The opinion of the court of appeals, dated July 21, 2000, is reported at 221 F.3d 634 (4th Cir. 2000) and reproduced in the Appendix to this Petition ("Pet. App.") at Pet. App. 1. The opinion of the district court, dated April 27, 1999, is reported at 47 F. Supp. 2d 678 (E.D. Va. 1999) and is reproduced at Pet. App. 28.

The district court also entered the following decisions, which are not reproduced in the Appendix:

1. *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, 191 F.R.D. 508 (E.D. Va. 1999) (denying Spain's motion to amend judgment);

2. *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, 1999 U.S. Dist. LEXIS 21752 (E.D. Va. 1999) (denying a salvage award to Sea Hunt, Inc.);

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[1] The Commonwealth understands that Sea Hunt, Inc., is filing a separate petition for writ of *certiorari* in this matter.

3. *Sea Hunt, Inc. v. The Unidentified, Shipwrecked Vessel or Vessels*, 22 F. Supp. 2d 521 (E.D. Va. 1998) (denying United States' motion to intervene on behalf of Spain).

JURISDICTION

The judgment of the court of appeals was entered July 21, 2000. Pet. App. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Article III, section 2 of the Constitution of the United States provides: "The judicial Power shall extend to all cases, in law and equity, arising under . . . treaties made . . . to all cases of admiralty and maritime jurisdiction . . . " and to cases "between a state, or the citizens thereof, and foreign states, citizens or subjects."

The Abandoned Shipwreck Act of 1987 ("ASA"), 43 U.S.C. §§ 2101-2106, is reproduced in the Petitioner's Appendix at Pet. App. 60-65. The Petitioner's Appendix also contains pertinent text of (i) the 1763 Definitive Treaty of Peace Between France, Great Britain, Portugal and Spain (Feb. 10, 1763), 42 Consol. T.S. 279 (Pet. App. 66), (ii) the 1819 Treaty of Amity, Settlement, and Limits Between the United States and Spain (Feb. 22, 1819), 8 Stat. 252, T.S. No. 327, 11 Bevins 528 (Pet. App. 67), and (iii) the 1902 Treaty of Friendship and General Relations Between the United States and Spain (July 3, 1902), 33 Stat. 2105, T.S. No. 422, 11 Bevins 628 (Pet. App. 68).

STATEMENT OF THE CASE

At stake in this case is the proper standard of abandonment under admiralty law for ancient shipwrecks recently-discovered and embedded in the submerged lands of a State. This is an issue left open by *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), where the Court said the meaning of "abandoned" under the Abandoned Shipwreck Act conforms with its meaning under admiralty law, but did not explain what admiralty law says on the issue. *Id.* at 508. The occasion for bringing this issue to the Court is a dispute over the ownership of two wrecked vessels recently discovered to be embedded in Virginia's submerged lands. One is believed to be *La Galga* and the other is believed to be *Juno*. Both originally belonged to the Kingdom of Spain.

La Galga was an armed Spanish frigate commissioned in 1732. On its last voyage, *La Galga* was part of a convoy of merchant ships crossing the Atlantic to Cadiz, Spain. On August 18, 1750, the convoy ran into a hurricane near Bermuda and was scattered. During the seven-day storm, *La Galga* lost three masts and began to take on water. Although the crew attempted to lighten the ship by pushing her cannon overboard, *La Galga* sank off the Eastern Shore near the Maryland/Virginia border on August 25, 1750. Most of her passengers and crew reached land safely. The Captain of the *La Galga* attempted to salvage items from the wreck, but looting and pillaging from local residents hindered his efforts. The Captain eventually succeeded in obtaining the assistance of the Governor of Maryland, but another storm destroyed the remains of the ship and made them inaccessible to further salvage. *La Galga* is considered to be the historical source of the

wild ponies of Chincoteague. Her remains now rest scattered beneath the coastal waters of Virginia.[2]

A more tragic fate befell *Juno*. Built in 1789, *Juno* was an armed Spanish frigate commissioned in 1790. On October 1, 1802, she left Havana, along with another ship, the *Anfiriza*, bound for Cadiz. *Juno* was transporting the Third Battalion of the Regiment of Africa, along with the soldiers' families and several other civilian officials. On October 19, 1802, a storm separated the two ships. Three days later, *Juno* began to take on water, and her crew dumped her cannon in an attempt to lighten her. On October 25, 1802, *Juno* encountered *La Favorita*, an American schooner, and they sailed westward together in the hope of reaching a port. *Juno* continued to take on water, and on October 27 her Captain ordered the passengers and crew to begin transferring to *La Favorita*. Only seven people were able to reach *La Favorita* before the storm forced the ships apart. The next day *La Favorita* lost sight of *Juno* in a heavy fog. When the fog cleared, *Juno* was gone. A total of 432 sailors, soldiers and civilians died when *Juno* sank. Some maintain that a large shipment of precious metals went down also.[3]

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[2] For purposes of this Petition, the term "coastal waters" means waters and submerged lands sufficiently close to shore to be covered by the ASA, while "high seas" refers to waters and submerged lands sufficiently distant from the shore as to be beyond the reach of the ASA.

[3] Maria Puente, *1802 Shipwreck in The Eye of a Modern Legal Storm*, USA Today, May 7, 1998, at 9A. "According to some accounts, it carried $500 million in coins and precious metals." Sonja Barisic, *Treasure Hunting: Finders Keepers Is In Trouble*, Richmond Times Dispatch, October 17, 2000, B2. The Kingdom

In 1987, Congress passed the Abandoned Shipwreck Act, 43 U.S.C. §§ 2101-2106. The ASA transferred ownership of abandoned shipwrecks embedded in the submerged lands of the States to those States. 43 U.S.C. § 2105(c). By virtue of the ASA, the Commonwealth of Virginia claims ownership of abandoned shipwrecks embedded in its submerged lands, including the vessels at issue here.

Sea Hunt, Inc. ("Sea Hunt") is a maritime salvage company that has located several shipwrecks close to the shore of Assateague Island, within the territorial waters of Virginia, two of which Sea Hunt believes are *La Galga* and *Juno*.[4] Sea Hunt sought and obtained permits from the Virginia Marine Resources Commission, an agency of the Commonwealth, to explore the sites and to conduct salvage operations. Sea Hunt also filed an *in rem* admiralty action in the Eastern District of Virginia. The Kingdom of Spain intervened, asserting that if the wrecks located by Sea Hunt are *Juno* and *La Galga*, they are the property of Spain which Spain has not abandoned, and that Spain retains ownership of those wrecks.

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of Spain denies that *Juno* carried a large shipment of precious metals.

[4] *Juno* is also the supposed *in rem* subject of another admiralty case, *Quicksilver International, Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel*, No. 88-618-N (E.D. Va. filed Sept. 13, 1988). *Sea Hunt, Inc. v. The Unidentified, Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678, 681 n.1 (E.D. Va. 1999). The *Quicksilver* search site is well beyond the territorial waters of the Commonwealth of Virginia. The Kingdom of Spain has not intervened in the *Quicksilver* case.

The district court applied the express abandonment standard devised by the Fourth Circuit in *Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co.*, 974 F.2d 450 (4th Cir. 1992). Under this standard it held that *La Galga* had been expressly abandoned by Spain by the terms of Article XX of the 1763 Definitive Treaty of Peace Between France, Great Britain, Portugal and Spain (Pet. App. 66), and thus was the property of Virginia. *Sea Hunt, Inc. v. The Unidentified, Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678, 691-92 (E.D. Va. 1999). The district court further held that *Juno* had not been expressly abandoned by Spain, rejecting Sea Hunt's argument that express abandonment could be found in Article 2 of the 1819 Treaty of Amity, Settlement and Limits Between the United States and Spain (Pet. App. 67) and the declaration of war between Spain and the United States in 1898. *Id.* at 690-91, Pet. App. 54-58.

All parties appealed to the Fourth Circuit, which affirmed in part and reversed in part, applying its express abandonment standard from *Columbus-America. Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 640-44 (4th Cir. 2000). As to *Juno*, the Fourth Circuit affirmed for the reasons stated by the district court. *Id.* at 643, n.1, Pet. App. 17. But the Fourth Circuit reversed as to *La Galga*, holding that the 1763 Treaty did not expressly abandon *La Galga*, and that Article X of the 1902 Treaty of Friendship and General Relations Between the United States and Spain (Pet. App. 68) required an express abandonment standard for Spanish shipwrecks, regardless of when they sank. *Id.* at 642-44.

REASONS FOR GRANTING THE WRIT

Summary

What does admiralty law require in order for a shipwreck to be abandoned? This issue directly affects the property interests that Congress granted to the States under the Abandoned Shipwreck Act. Given the interests of the States, it is an important question of federal law that has not been, but should be, settled by this Court.

The need for an answer from this Court is especially acute since the circuits are in conflict. Must abandonment be express, or may it be implied? Must the proof be clear and convincing, or does a preponderance of the evidence suffice? Admiralty law should give the same answers nationwide, but now it does not. Inconsistent answers are especially troublesome when, as here, they create disparities among the rights of States. *Certiorari* should be granted to resolve this conflict.

There are at least two major reasons why this Court should use *this case* to resolve the conflict. First, this case involves a dispute between a State and a foreign power and, thus, exemplifies the kind of dispute that is likely to arise repeatedly with respect to ancient shipwrecks in coastal waters. Second, this case contains a number of subsidiary questions that the Court may choose to address in providing guidance to lower federal courts on the law of admiralty. These subsidiary questions include the following: (a) whether a different standard applies for sovereign vessels and, if so, whether *all* sovereign vessels, or only warships, are entitled to the different standard, (b) whether the same standard applies to ancient wrecks and modern ones, (c) whether a lack of contemporaneous

salvage technology argues for abandonment or against it, and (d) whether the same standard applies to both the high seas and coastal waters.

THE MEANING OF "ABANDONMENT" IS AN IMPORTANT QUESTION OF FEDERAL LAW.

The States of the Union exercise sovereignty over submerged lands lying adjacent to their shores.[5] Embedded in those submerged lands are the wrecks of thousands of ships, lost over the centuries. Congress has estimated that 50,000 abandoned shipwrecks are located in State waters, with "5-10 percent" having historical significance. See *Abandoned Shipwreck Act of 1987*, H.R. Rep. Nos. 100-514(I) & 100-514(II), 100th Cong., 2d Sess. 1, (1988), *reprinted in* 1988 U.S.C.C.A.N. at 365, 370. *See also* Bruce D. Berman, Encyclopedia of American Shipwrecks, iii (1972) (referring to "more than 50,000 documented shipwrecks in American territorial waters," including approximately 13,000 with a gross tonnage of 50 tons or more).

Under the ASA, shipwrecks "abandoned" by their original owners now belong to the States in whose submerged lands they lie embedded. 43 U.S.C. § 2105(c).

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[5] By virtue of the 1953 Submerged Lands Act, States bordering the Atlantic Ocean or Pacific Ocean may exercise sovereignty over lands lying beneath the ocean for a distance of three miles from their shores. States bordering the Gulf of Mexico may exercise like sovereignty into the Gulf for a distance of up to three marine leagues. Great Lake States may exercise such sovereignty to the boundary with Canada. 43 U.S.C. §§ 1301, 1312.

Some of the ships are believed to have been carrying gold or other precious cargo. Others may hold artifacts of important historical value.

Included among these shipwrecks are vessels as old as the *Tiger*, a British ship sunk along the Outer Banks of North Carolina in 1585,[6] and as tragic as *Juno*. They include the *Queen Anne's Revenge*, flagship of the notorious pirate, Blackbeard, recently discovered in North Carolina waters;[7] the schooner *Billy Bowlegs*, a privateer lost in 1840 at the entrance to Apalachicola Bay, Florida and valued at the time at over $4 million;[8] the *Phoenix*, a three-masted, three-decked Russian frigate, the first ship built in Russian America, that sank in Alaskan waters in 1799 with the loss of the Archimandrite of the Kodiak Mission;[9] and H.M.S. *Nancy*, a Detroit-built British warship burned and sunk by U.S. warships in Lake Huron during the War of 1812.[10]

For vessels such as these – and the thousands of other shipwrecks in coastal waters – State ownership

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[6] Bruce D. Berman, Encyclopedia of American Shipwrecks, 147 (1972).

[7] *See* Faye Mitchell Henderson, *A Blackbeard Valentine's Tale* (last modified Feb. 12, 1999) <http://web.dcr.state.nc.us/recentblackbeard.htm>.

[8] Bruce D. Berman, Encyclopedia of American Shipwrecks, 109 (1972).

[9] Mike Burwell, *Shipwrecks off Alaska's Coast* (last modified Oct. 10, 2000) <http://www.mms.gov/alaska/ref/ships/shipdb/p_ships.asp>.

[10] David Swayze, *The Great Lakes Shipwreck File: Total Losses of Great Lakes Ships 1679-1998* (last modified July 2000) <http://www.oakland.edu/boatnerd/swayze/shipwreck/n.htm>.

means protection and responsible management. As the owners of shipwrecks, States are able to restrict recovery operations to those who are qualified and licensed. They are able to impose protocols that meet the exacting demands of serious underwater archeology.[11] And they are in a position to ensure that the cultural riches – and other treasures – recovered from the sea are shared with the public.

In order to have these benefits, the States must have title. But, in order for States to obtain title under the ASA, the shipwreck must be abandoned. Yet, "abandonment" is a term that has not been defined by statute or by this Court. Given the important State interests that hang in the balance, the definition of this term is an important question of federal law that has not been, but should be decided by this Court.

THE CIRCUITS ARE IN CONFLICT.

A "fundamental purpose" of the Constitution is to "preserve adequate harmony and appropriate uniform rules relating to maritime matters. . . . " *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920). Despite the need for harmony and uniformity, the circuits are divided on whether the abandonment of shipwrecks must be express,

[11] *See, e.g.*, Va. Code § 28.2-1204 (1997); Va. Code § 10.1-2214 (1998) ("All recovery operations . . . shall be carried out . . . in such a manner that the maximum amount of historical, scientific, archaeological and educational information may be recovered and preserved in addition to the physical recovery of items."). Sea Hunt's permit from the Commonwealth of Virginia incorporated these requirements.

or whether it may be implied. They also differ as to the standard of proof, the effect of a long passage of time, and other factors. The Fourth Circuit has imposed the strictest standard of any circuit: clear and convincing evidence of express abandonment. *Sea Hunt*, 221 F.3d at 640, Pet. App. 9 (applying the standard developed in *Columbus-America*, 974 F.2d 450 (4th Cir. 1992)). Some circuits have used this same standard; others have used a standard more favorable to encouraging recovery operations. The conflicting positions of the circuits may be summarized as follows:

First Circuit: Presumption of abandonment based on passage of time – *Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059 (1st Cir. 1987);[12] *see also Commonwealth v. Maritime Underwater Surveys, Inc.*, 403 Mass. 501, 531 N.E.2d 549 (1988).[13]

Second Circuit: Clear and convincing evidence of express abandonment – *Dluhos v. The Floating & Abandoned Vessel Known as the New York*, 162 F.3d 63 (2nd Cir. 1998).[14]

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[12] Law of finds (based on abandonment) said to be appropriate where "(1) articles have been presumptively abandoned, *i.e.* either affirmatively renounced, or so long lost that time can be presumed to have eroded any realistic claim of original title, and (2) those articles are now in hand, having been actually recovered. . . . " 833 F.2d at 1065. The *Republic* sank in 1909, seventy-six years before the First Circuit ruled.

[13] "We conclude that, since the *Whydah* has rested undisturbed and undiscovered beneath the sea for nearly three centuries, it is proper to consider the wreck abandoned and accordingly apply the law of finds." 531 N.E.2d at 552.

[14] This case concerned a claim for ownership of a ship in the Erie Canal. Commenting on the preference for the law of

Third Circuit: No reported circuit decision. District courts have used different standards: (i) Presumption of abandonment based on passage of time – *Sub-Sal, Inc. v. The DeBraak*, No. 84-296-CMW, 1992 U.S. Dist. LEXIS 2461 (D.Del. February 4, 1992);[15]

(ii) Consideration of all the circumstances – *Moyer v. The Wrecked & Abandoned Vessel, known as The Andrea Doria*, 836 F. Supp. 1099 (D.N.J. 1993).[16]

Fifth Circuit: Presumption of abandonment based on passage of time, implied abandonment – *Treasure Salvors,*

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salvage over the law of finds, the Second Circuit stated "the *New York* has neither been expressly and explicitly abandoned by its owners, nor has it rested for centuries under fathoms of open ocean." 162 F.3d at 74 (footnote omitted).

[15] *Sub-Sal* was decided prior to enactment of the ASA, and concerned a British warship. "Since the *DeBraak* was abandoned in 1798 and its location off the coast of Delaware remained unknown until 1984, this Court concludes that the law of finds applies." 1992 U.S. Dist. Lexis at *8. No evidence was presented of express abandonment, and, like *Juno*, the *DeBraak's* location was unknown for almost 200 years.

[16] *Moyer* found an implied renunciation of ownership in the face of numerous independent, open and notorious salvage operations. "Abandonment may be inferred from circumstantial evidence. Factors such as lapse of time and nonuse by the owner may give rise to an inference of an intent to abandon." 836 F. Supp. at 1105 (citing *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456 (E.D. Va. 1960)). "Other factors include the place of the shipwreck as well as the actions and conduct of the parties having ownership rights in the vessel." 836 F. Supp. at 1105 (citing *Columbus-America Discovery Group v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 742 F. Supp. 1327, 1335 (E.D. Va. 1990), *rev'd in part and remanded, Columbus-America Discovery Group v. Atlantic Mutual Insurance Group*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993)).

Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978).[17]

Sixth Circuit: Clear and convincing evidence and implied abandonment – *Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence*, 177 F.3d 491 (6th Cir. 1999).[18]

Ninth Circuit: Implied abandonment, but a demanding evidentiary standard (insurer's failure to react to earlier salvage efforts and failure to participate in claims proceedings are insufficient to imply abandonment) – *Yukon Recovery, L.L.C. v. Certain Abandoned Property*, 205 F.3d 1189 (9th Cir. 2000), *cert. denied*, 2000 U.S. LEXIS 5111 (U.S. Oct. 2, 2000).[19] Consideration of all the circumstances, with implied abandonment from passage of time or failure to salvage – *Deep Sea Research, Inc. v. The Brother Jonathan*, 89 F.3d 680 (9th Cir. 1996), *aff'd in part and*

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[17] "Disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths." 569 F.2d at 337. Significantly, the original owner of the ship at issue was the Kingdom of Spain.

[18] "We agree that lapse of time, alone, does not necessarily establish abandonment, . . . and an owner's failure to return to a shipwreck site does not necessarily prove abandonment, but we recognize that a combination of several facts, proved clearly and convincingly, . . . may support a finding that an owner has abandoned a shipwreck." 177 F.3d at 499-500.

[19] Apparently the District Court in *Yukon Recovery* used the preponderance of the evidence standard, which the Ninth Circuit declined to address. 205 F.3d at 1193-94. The Ninth Circuit also agreed that Ocean Mar was entitled to salvage the wreck based in part on its salvage contract with the gold insurer. *Id.* at 1197.

vacated in part on other grounds and remanded sub nom., California v. Deep Sea Research, Inc., 523 U.S. 491 (1998).[20]

Eleventh Circuit: Presumption of abandonment based on passage of time, implied abandonment – *Klein v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985);[21]

The existence of a troublesome conflict among the circuits has been recognized by the very circuit whose standard of abandonment is at issue here:

> [W]e agree that the [Fourth Circuit's] abandonment test was rejected by two other courts of appeal. . . . A comparison of our earlier decision in this case . . . with the decision of the Supreme Court and the Ninth Circuit in *Brother Jonathan* and the Sixth Circuit in *Fairport* indicates that the rule for finding abandonment is more stringent in [the Fourth Circuit] than in the Sixth Circuit and may be the same as the Ninth Circuit's rule in *Brother Jonathan*. *In any event, the rule in the three circuits is not the same and the Supreme Court has not clarified the question.* . . .

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[20] "Although the district court in this case cites the Fourth Circuit's decision in *Columbus-America*, its holding that the *Brother Jonathan* is not abandoned rests on the traditional rule that a wreck is not abandoned unless either 1) title is affirmatively renounced, or 2) abandonment can be inferred from the lapse of time or failure to pursue salvage efforts on the part of the owners." 89 F.3d at 688.

[21] The Eleventh Circuit adopted the reasoning of the Fifth Circuit in *Treasure Salvors, Inc.*, 569 F.2d 330. *See supra* at n.17. Interestingly, the Eleventh Circuit named the United States as the wreck's owner, but the *Columbus-America* and *Sea Hunt* decisions would retain ownership in Great Britain.

Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co., 203 F.3d 291, 303-04 (4th Cir. 2000) (emphasis added). *See Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence*, 105 F.3d 1078, 1084 (6th Cir. 1997); *Deep Sea Research, Inc. v. The Brother Jonathan*, 102 F.3d 379, 387-88 (9th Cir. 1996). This divergence is particularly disturbing since it results in disparate treatment of the States, all of which are entitled to stand on an equal footing before the federal government. It is a divergence that can only be corrected by this Court's exercise of its constitutional role to maintain uniform admiralty laws. *Fitzgerald v. United States*, 374 U.S. 16 (1963); *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959). The petition should be granted.

THIS CASE PRESENTS A GOOD OPPORTUNITY TO RESOLVE THE CONFLICT.

There are at least two major reasons why the Court should use *this case* to resolve the conflict among the circuits. First, this case involves a dispute between two sovereigns: the Commonwealth of Virginia and the Kingdom of Spain. As such, it may well be a forerunner of many other disputes between (i) coastal States claiming ownership of ancient wrecks under the ASA, and (ii) foreign powers seeking to re-assert ownership of long lost vessels newly discovered in the submerged lands of those States. For example, among the wrecks believed to be located in State coastal waters are more than 600 ships owned at one time by the Kingdom of Spain. William J.

Broad, *Court Ruling on Spanish Frigates Foils Modern-Day Treasure Hunt*, The New York Times, July 31, 2000, A1 (quoting estimate of Spanish officials). Where the interests of States are opposed by those of foreign powers, it is important that there be a *national* rule of law, which ultimately can only be provided by the nation's highest court. Thus, even if there were no conflict among the circuits, the standard of abandonment for coastal water shipwrecks of a foreign sovereign is an important question of federal law that has not been, but should be, settled by this Court.

Second, this case offers the Court an opportunity either to paint with a broad brush, or to paint some of the fine details of admiralty law that may be appropriate in different circumstances. There are at least four such points that may be addressed here.

A. *Effect of Sovereign Ownership*: While *La Galga* and *Juno* once belonged to a foreign sovereign, it is unclear whether – at the time of their sinking – they were warships, or were being employed by their sovereign for some other purpose. The district court expressly declined to address this issue. *Sea Hunt*, 47 F. Supp. 2d at 685, 688, Pet. App. 49 ("Because of the assertion of a universal rule of express abandonment, it is irrelevant in this case for the purpose of determining abandonment whether *Juno* and *La Galga* were warships in the service of Spain at the time of their sinking."). The court of appeals suggested that a more stringent rule may apply to sovereign ships than to privately owned vessels *Sea Hunt*, 221 F.3d at 643,

Pet. App. 15.[22] By contrast, other courts have used an implied abandonment standard for sovereign ships, even for sovereign warships. *See Sub-Sal, Inc. v. The DeBraak*, No. 84-296-CMW, 1992 U.S. Dist. LEXIS 2461 (D.Del. February 4, 1992); *Marx v. Gov't of Guam*, 866 F.2d 294 (9th Cir. 1988) (1690 Spanish galleon abandoned in territorial waters of Guam); Klein, 758 F.2d 1511 (English Navy ship); *Platoro Ltd., Inc. v. The Unidentified Remains of a Vessel*, 614 F.2d 1051 (5th Cir. 1980) (1554 Spanish galleon abandoned in Texas territorial waters); *Treasure Salvors*, 569 F.2d 330 (5th Cir. 1978) (Spanish galleon).

Assuming *arguendo* that special treatment for some sovereign ships is appropriate, it is important to determine the contours of that treatment. Not all vessels belonging to a foreign power are warships. Depending upon the economic system used by the foreign government, a wide array of vessels may be owned by a foreign

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[22] Subsumed under the question presented by this petition is the issue of whether ships belonging to one particular sovereign – the Kingdom of Spain – may require an express abandonment standard by virtue of Article X of the 1902 Treaty of Friendship and General Relations between the United States and Spain. The court of appeals relied on this treaty as one basis for its decision to use an express abandonment standard. 221 F.3d at 642, Pet. App. 13.

This is not, however, an independent reason for using an express abandonment standard. Under an implied abandonment standard, *La Galga* and *Juno* were already abandoned at the time the 1902 treaty took effect, and thus were no longer the property of Spain. Moreover, even if abandonment had not yet occurred as of 1902, the treaty is best viewed as speaking to vessels that become imperiled *after* the effective date of the treaty and not to shipwrecks – abandoned or otherwise – occurring before 1902.

sovereign, including Russian fishing trawlers or Chinese cargo ships. In the eighteenth century, European countries – Spain in particular – distinguished between whether a ship was (i) a warship or (ii) an armed vessel belonging to the sovereign and merely transporting passengers and cargo.[23] This case gives the Court an opportunity to fashion a rule that will give guidance to lower federal courts on the significance of the distinction between sovereign and private ships, and between warships and other vessels.

B. *Distinction Between Ancient and Modern*: The ships at issue here are ancient. *La Galga* sank in 1750, *Juno* in 1802. There is a sound basis for the view that the standard for abandonment of ancient vessels – even ancient warships – should be different from the standard applicable to more recent wrecks. Certainly, there is an important practical distinction between (i) relatively intact modern naval vessels likely to contain military secrets, nuclear materials and/or the remains of military personnel, and (ii) ancient vessels that no longer have military value, that have been scattered across the ocean floor and whose human remains have long been consumed by the sea. There is also sound legal authority for the ancient/modern distinction. "[D]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths." *Columbus-America*, 974 F.2d at 477 (Widener, J., dissenting) (*quoting Treasure Salvors*, 569 F.2d at 337 (5th

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[23] *See* Affidavit of Horatio Pardo, Court of Appeals Joint Appendix 363.

Cir. 1978) (Spanish galleon sunk in 1622); *also citing Martha's Vineyard*, 833 F.2d at 1065 (ocean liner sunk in 1909); *Klein*, 758 F.2d at 1514 (11th Cir. 1985) (English Navy ship sunk in eighteenth century)).

Moreover, in an official Opinion, dated December 30, 1980, which was tendered by the Department of State Legal Advisors' Office to the Maritime Administration, it was concluded that

> "[t]he practice of the U.S. and other countries in recent years has been to depart from the earlier view that abandonment of a warship could be implied by the long passage of time . . . In the absence of an express transfer or abandonment of a U.S. warship sunk in the near past (*e.g.*, in the World War II era), it should be presumed that title to such vessels remains in the U.S. *Title to vessels sunk in the more distant past (such as during the 17th and 18th centuries) would, of course, still be determined by the more conventional interpretations of abandonment of that period.*"

Digest of United States Practice in International Law 1004 (Marian Nash Leich ed. 1980) (Dept. of State File No. 81-0004-0338) (emphasis added). This case gives the Court an opportunity to fashion a rule that will give appropriate protection to modern warships without stretching a legal fiction to lengths that are both absurd and contrary to the interests that Congress sought to promote when it passed the ASA.

C. *Absence of Contemporaneous Technology*: The Fourth Circuit's decision is based in part on the view that technological inability to find or salvage a shipwreck

argues *against* abandonment. *Sea Hunt*, 221 F.3d at 647, Pet. App. 25 ("Lack of technology is one factor to consider in determining whether inaction constitutes abandonment.") (*quoting Yukon Recovery*, 205 F.3d at 1194). But, this has gotten things backwards, at least insofar as older shipwrecks are concerned. If the generation in which a vessel sank had no means to find or salvage it, a court should infer, in the absence of other evidence, that the owners of that vessel, having no hope of remedying their loss, simply abandoned it. *See generally, Eads v. Brazelton*, 22 Ark. 499 (1861) (rejecting claim by attempted salvor whose inability to recover shipment of lead was the result of the lack of steam power and other technology used by later, successful salvor).

The *Sea Hunt* decision implicitly attributes to generations past a faith in technological progress that is a phenomenon of the late twentieth century. When confronted by a problem that current technology cannot solve, society today tends to believe it is only a matter of time before a solution will be found. It is an attitude that springs from witnessing the marvels of technology over the past one or two generations. But for most of human history, the pace of progress has been very slow. The wooden ships that sailed the ocean two hundred years ago still had no means of power other than the wind, no means to light their craft other than oil lamps, and had been equipped only recently with a reliable means of finding their longitude at sea.[24] Ships were made of

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[24] The means to accurately calculate one's longitude did not become available until the 1780's, after the loss of *La Galga*. *See* Dava Sobel and William J.H. Andrewes, The Illustrated Longitude (1998).

wood, and they were all designed to float on top of the sea, not sail beneath it. Electric power was still generations away. Plumbing the bottom of the ocean was no more possible for man than flying to the moon.

Two or more centuries later, those who seek shipwrecks may do so by the use of science that not even Jules Verne predicted: computer-guided, satellite-based, geo-positioning technology and robotic submarines outfitted with video cameras. To suggest that the owners of long lost shipwrecks not only foresaw the ability to recover them – but based their decisions on such prophecies – is fantasy. If the technology of the era did not permit recovery of a sunken vessel, the owners did not decide to wait a century or two until all these things could be invented. They did what any reasonable person of the era would have done: they gave up all hope of recovering their property. That is to say, they abandoned it.[25] This case presents the Court with an opportunity to decide whether the absence of contemporaneous

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[25] "They [the insurance companies] had no hope or idea they could locate the *Central America*, and even if they located it, they had no hope they could recover anything from it. . . . Such action was guided by the decision that location of the wreck was next to impossible; but, even if located, recovering it was beyond the ability of any known means. Not only was this true in 1857, and five years thereafter, but continued to be true for some one hundred years thereafter. But even after scientific means of locating ship wrecks and possible recovery in deep water became known some twenty or more years prior to the actions of the plaintiff in this case, still not one of the insurance companies undertook to locate or recover the *Central America*." *Columbus-America*, 742 F. Supp. at 1345.

technology to recover an older wreck tends to prove or disprove abandonment.

D. *Distinction Between Coastal Waters and High Seas*: The Fourth Circuit mechanically applied to the wrecks of *La Galga* and *Juno*, in coastal waters, the same express abandonment theory it used in *Columbus-America* for wrecks on the high seas. What the court of appeals failed to recognize is that the rationale on which it based the *Columbus-America* decision makes no sense when applied to coastal waters. The shipwreck in *Columbus-America* was found 160 miles from shore, well beyond the reach of the ASA. In determining what law to apply to the case, the court of appeals was faced with two options – finds law and salvage law – with the choice between them depending on whether or not the vessel was abandoned. If the vessel *was* abandoned, then no one had title to it and the law of finds applied. If it was *not* abandoned, title remained with the original owner and the law of salvage applied. Before deciding what abandonment standard to use, the Fourth Circuit expressed a policy of favoring salvage law over finds law. It said:

> In sharp contrast to "the harsh, primitive, and inflexible nature of the laws of finds" is the law of salvage. *Admiralty favors the law of salvage over the law of finds because salvage law's aims, assumptions, and rules are more consonant with the needs of marine activity and because salvage law encourages less competitive and secretive forms of conduct than finds law.*

Columbus-America, 974 F.2d at 460 (emphasis added). The Fourth Circuit then set the abandonment standard high in

order to give a broad sweep to the favored law of salvage and a narrow sweep to the disfavored law of finds.

In coastal waters, however, there is no law of finds. Instead, there is the law of salvage and the law of State ownership, with the choice between them again depending on whether or not the vessel was abandoned. If the vessel was *not* abandoned, title to it remains with the original owner and the law of salvage applies. If it *was* abandoned, title is vested in the State under the ASA. Since title must be vested in either the original owner or the State, the precondition on which the law of finds is based – *i.e.*, that no one has title – never arises. *Dluhos*, 162 F.3d at 74, n.10; *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456 (E.D. Va. 1960). *See also* 43 U.S.C. § 2106 (2000) ("The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which § 6 of [the ASA][43 U.S.C. § 2105] applies.").[26] Thus, in coastal waters, the rationale that animated the

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[26] There is one hypothetical exception to the proposition that the law of finds has no application in areas governed by the ASA. Under that statute, in order for a State to become the owner, the shipwreck must be both "abandoned" and "embedded" in the State's submerged lands. Theoretically, a shipwreck could be abandoned but not yet embedded. In such a case, the law of finds would apply to the abandoned wreck until it became embedded. As a practical matter, however, it is not likely that any ship of any value would be so readily abandoned, especially since "embeddedness" is a criterion that is met soon after the ship sinks to the bottom. "For purposes of this Act . . . the term 'embedded' means firmly affixed in the submerged lands or in corralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, *and any part thereof.*" 43 U.S.C. § 2102 (emphasis added).

Fourth Circuit in *Columbus-America* – a preference for the law of salvage over the law of finds – is irrelevant. "Where the reason of the rule ceases, the rule also ceases." *Funk v. United States*, 290 U.S. 371, 385 (1933); *United States v. Chambers*, 291 U.S. 217, 226 (1934).

If the policy-driven methodology used in *Columbus-America* is transported from the high seas into coastal waters, the result should be an abandonment standard directly opposite to the one reached by the Fourth Circuit. If finds law is disfavored compared to salvage law, then salvage law must likewise be disfavored compared to State ownership under the ASA.[27] Thus, when the shipwreck is in coastal waters, the abandonment standard must be set low in order to give broad sweep to State ownership, which is the favored law in that context. This means using a standard of implied abandonment for shipwrecks in coastal waters.

In short, the policy-driven methodology used in *Columbus-America* logically leads to different standards in

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[27] This preference for State ownership must be recognized for at least three reasons: First, to paraphrase *Columbus-America*, State ownership's "aims, assumptions and rules are more consonant with the needs of marine activity [than salvage law] and . . . [State ownership] encourages less competitive and secretive forms of conduct than [salvage law]." 974 F.2d at 460. Second, State ownership is the result of congressional deliberation and enactment of the ASA, and thus represents a conscious policy choice made by the legislative branch. If Congress thought that salvage law was good enough for coastal waters, it would have said so. Third, State ownership is better designed than the law of salvage to protect the public interest in the historic value – and potential financial value – of shipwrecks in coastal waters.

different contexts. If different standards are appropriate, this case presents the Court with an opportunity to say so. Conversely, if a single standard is appropriate, this case presents an opportunity to define it and to articulate a rationale that is relevant to both settings. The petition for writ of *certiorari* should be granted.

CONCLUSION

A conflict among the circuits on an important legal issue can always be problematic. But it is especially troublesome when it occurs in admiralty law, where uniformity has always been greatly valued. It is even more urgent when the conflict causes some States of the Union to be denied important benefits that other States are granted and when it may give some States a more favored position than others vis-à-vis foreign powers. Such a troublesome and urgent conflict has arisen on the issue of abandonment. It should be resolved as soon as possible, and resolved in a manner that gives all States the full and equal ownership rights that Congress intended when it passed the Abandoned Shipwreck Act. This case presents the Court with an opportunity to address the issue and

settle the matter. The petition for writ of *certiorari* should be granted.

October 19, 2000

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SEA HUNT, INCORPORATED, Plaintiff-Appellee, and COMMONWEALTH OF VIRGINIA, Intervenor-Appellee, v. THE UNIDENTIFIED SHIPWRECKED VESSEL OR VESSELS, THEIR APPAREL, TACKLE, APPURTENANCES, AND CARGO LOCATED WITHIN COORDINATES 38 DEGREES 01' 36" NORTH LATITUDE, 75 DEGREES 14' 33" WEST LONGITUDE; 37 DEGREES 57' 21" NORTH LATITUDE, 75 DEGREES 13' 00" WEST LONGITUDE; 38 DEGREES 01' 36" NORTH LATITUDE, 75 DEGREES 13' 14" WEST LONGITUDE; 37 DEGREES 57' 33" NORTH LATITUDE, 75 DEGREES 17' 44" WEST LONGITUDE AND/OR 37 DEGREES 55' 00" NORTH LATITUDE, 75 DEGREES 19' 18" WEST LONGITUDE; 37 DEGREES 54' 09" NORTH LATITUDE, 75 DEGREES 17' 00" WEST LONGITUDE; 37 DEGREES 51' 21" NORTH LATITUDE, 75 DEGREES 18' 52" WEST LONGITUDE; 37 DEGREES 52' 20" NORTH LATITUDE, 75 DEGREES 21' 05" WEST LONGITUDE, IN REM, Defendant, KINGDOM OF SPAIN, Claimant-Appellant, and COMMONWEALTH OF VIRGINIA, ex rel William A. Pruitt, Commissioner of Marine Resources and Chairman of the Virginia Marine Resources Commission; ALPHA QUEST CORPORATION; RICHARD L. COOK, an individual resident of Ocean City, Maryland, Claimants, and UNITED STATES OF AMERICA; COLUMBUS-AMERICA DISCOVERY GROUP; SALVORS, INCORPORATED; COBB COIN COMPANY, INCORPORATED; INTERSAL, INCORPORATED; ENTERPRISE MARINE, INCORPORATED; QUICKSILVER, INCORPORATED; DEEP SEA RESEARCH, INCORPORATED; STATE OF NORTH CAROLINA, Amici Curiae.

No. 99-2035

SEA HUNT, INCORPORATED, Plaintiff-Appellant, and COMMONWEALTH OF VIRGINIA, Intervenor-Plaintiff, v. THE UNIDENTIFIED SHIPWRECKED VESSEL OR VESSELS, THEIR APPAREL, TACKLE, APPURTENANCES, AND CARGO LOCATED WITHIN COORDINATES 38 DEGREES 01' 36" NORTH LATITUDE, 75 DEGREES 14' 33" WEST LONGITUDE; 37 DEGREES 57' 21" NORTH LATITUDE, 75 DEGREES 13' 00" WEST LONGITUDE; 38 DEGREES 01' 36" NORTH LATITUDE, 75 DEGREES 13' 14" WEST LONGITUDE; 37 DEGREES 57' 33" NORTH LATITUDE, 75 DEGREES 17' 44" WEST LONGITUDE AND/OR 37 DEGREES 55' 00" NORTH LATITUDE, 75 DEGREES 19' 18" WEST LONGITUDE; 37 DEGREES 54' 09" NORTH LATITUDE, 75 DEGREES 17' 00" WEST LONGITUDE; 37 DEGREES 51' 21" NORTH LATITUDE, 75 DEGREES 18' 52" WEST LONGITUDE; 37 DEGREES 52' 20" NORTH LATITUDE, 75 DEGREES 21' 05" WEST LONGITUDE, IN REM, Defendant, KINGDOM OF SPAIN, Claimant-Appellee, and COMMONWEALTH OF VIRGINIA, ex rel William A. Pruitt, Commissioner of Marine Resources and Chairman of the Virginia Marine Resources Commission; ALPHA QUEST CORPORATION; RICHARD L. COOK, an individual resident of Ocean City, Maryland, Claimants, and UNITED STATES OF AMERICA; COLUMBUS-AMERICA DISCOVERY GROUP; SALVORS, INCORPORATED; COBB COIN COMPANY, INCORPORATED; INTERSAL, INCORPORATED; ENTERPRISE MARINE, INCORPORATED; QUICKSILVER, INCORPORATED; DEEP SEA RESEARCH, INCORPORATED; STATE OF NORTH CAROLINA, Amici Curiae.

No. 99-2036

May 1, 2000, Argued
July 21, 2000, Decided

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JUDGES: Before WILKINSON, Chief Judge, and LUTTIG and MICHAEL, Circuit Judges. Chief Judge Wilkinson

wrote the opinion, in which Judge Luttig and Judge Michael joined.

OPINION:

WILKINSON, Chief Judge:

This *in rem* admiralty action concerns the sovereign rights of the Kingdom of Spain to two of its Royal Naval vessels, LA GALGA and JUNO, which were lost off the shores of present-day Virginia in 1750 and 1802 respectively. Pursuant to the Abandoned Shipwreck Act of 1987 (ASA), 43 U.S.C. § 2101-06 (1994), Virginia has asserted ownership over the shipwrecks and has issued Sea Hunt permits to conduct salvage operations and recover artifacts from the wrecks. These efforts resulted in the discovery of two wrecks believed to be LA GALGA and JUNO. Sea Hunt filed an *in rem* admiralty complaint, and the district court ordered an arrest of the shipwrecks, appointing Sea Hunt the exclusive salvor. Spain filed a verified claim asserting ownership over the shipwrecks. The district court found that Spain retained title to JUNO, but had expressly abandoned LA GALGA in the 1763 Definitive Treaty of Peace. *See Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678 (E.D. Va. 1999). The district court also denied Sea Hunt a salvage award.

As sovereign vessels of Spain, LA GALGA and JUNO are covered by the 1902 Treaty of Friendship and General Relations between the United States and Spain. The reciprocal immunities established by this treaty are essential to

protecting United States shipwrecks and military gravesites. Under the terms of this treaty, Spanish vessels, like those belonging to the United States, may only be abandoned by express acts. Sea Hunt cannot show by clear and convincing evidence that the Kingdom of Spain has expressly abandoned these ships in either the 1763 Treaty or the 1819 Treaty of Amity, Settlement and Limits, which ended the War of 1812. We therefore reverse the judgment of the district court with regard to LA GALGA, and affirm the judgment of the district court concerning JUNO and the denial of a salvage award.

I.

LA GALGA ("The Greyhound") was a fifty-gun frigate commissioned into the Spanish Navy in 1732. LA GALGA left Havana on its last voyage on August 18, 1750, in order to escort a convoy of merchant ships to Spain. It carried the Second Company of the Sixth Battalion of Spanish Marines, Spanish Royal property, and English military prisoners. On August 25, 1750, the convoy encountered a hurricane near Bermuda that scattered the ships and forced them westward toward the American coast. LA GALGA eventually sank off the coast of the Maryland/Virginia border. Most of the crew and passengers reached land safely. When Captain Daniel Houny attempted to salvage items from the wreck, he found that local residents had already begun looting the vessel. He secured the assistance of Governor Ogle of Maryland, but any further salvage efforts ended when a second storm came and broke up what was left of the ship. LA GALGA remained undisturbed until the recent salvage efforts by Sea Hunt.

The JUNO, a thirty-four gun frigate, entered the service of the Spanish Navy in 1790. On January 15, 1802, JUNO set sail from Veracruz bound for Spain. On board JUNO were the soldiers of the Third Battalion of the Regiment of Africa, their families, and various civilian officials. The JUNO was beset by a ferocious storm and began taking on water. It encountered the American schooner LA FAVORITA. The two ships sailed together trying to reach an American port before JUNO succumbed to her leaks. As JUNO continued to take on water, the Captain ordered his passengers and crew to begin transferring to LA FAVORITA. But only seven persons were able to transfer before the storm picked up and JUNO was lost in a heavy fog. LA FAVORITA could come close enough only to hear the anguished cries for help as JUNO went under. At least 413 sailors, soldiers, and civilians perished in the sinking of JUNO. Spanish authorities ordered an investigation into the sinking, but the location of the wreck was not discovered until Sea Hunt's recent efforts.

The Commonwealth of Virginia has asserted ownership over LA GALGA and JUNO pursuant to the Abandoned Shipwreck Act of 1987 (ASA), 43 U.S.C. §§ 2101-06 (1994). The ASA gives states title to shipwrecks that are abandoned and are embedded in the submerged lands of a state. *See id.* § 2105(a) & (c). Sea Hunt is a maritime salvage company based in the Eastern Shore of Virginia. The Virginia Marine Resources Commission granted Sea Hunt permits to explore for shipwrecks off the Virginia coast and conduct salvage operations. Sea Hunt began to explore for shipwrecks within its permit areas and has

spent about a million dollars in conducting remote sensing, survey, diving, and identification operations. Sea Hunt claims that its efforts have resulted in finding the remains of LA GALGA and JUNO.

To avoid interference with its operations, Sea Hunt initiated an *in rem* admiralty action against the two wrecks on March 11, 1998. Sea Hunt sought a declaratory judgment that the shipwrecked vessels "have never been subject to the sovereign prerogative of the Kingdom of Spain and [are] subject to admiralty's laws of abandonment and the law of finds," that "the Commonwealth of Virginia be adjudged the true, sole and exclusive owner of the Shipwrecked Vessel(s)," and that any items salvaged therefrom by Sea Hunt be distributed pursuant to the permits issued by Virginia. In the alternative, Sea Hunt sought a liberal salvage award for its efforts. On March 12, 1998, the district court issued an order directing the arrest of the shipwrecked vessels and granting Sea Hunt exclusive rights of salvage until further notice. The court also directed Sea Hunt to send specific notice of the action to both the United States and to Spain.

In response, the United States moved to intervene and filed a verified claim on behalf of Spain. The district court found that the United States lacked authority to appear on behalf of Spain and granted Spain 90 days to refile a verified claim. *See Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 22 F. Supp. 2d 521, 526 (E.D. Va. 1998). Spain's verified claim stated that the Kingdom of Spain "was and still is the true and bona fide owner of the vessels JUNO and LA GALGA . . . and that title and ownership interest in said vessels has never been abandoned or relinquished or transferred by the Kingdom of

Spain." Spain put forth affidavits and exhibits showing that at the time of their sinking both ships were serving as vessels of the Royal Navy, that both vessels are currently on the register of the Spanish Navy, and that transfer or abandonment of the vessels would require formal authorization by the government of Spain.

On April 27, 1999, the district court found that the express abandonment standard applied to these shipwrecks and that Spain had abandoned its claim to LA GALGA under Article XX of the 1763 Definitive Treaty of Peace between France, Great Britain and Spain. *See Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678, 690 (E.D. Va. 1999). It further found that Spain did not expressly abandon JUNO in the 1819 Treaty ending the conflict between Spain and the United States stemming from the War of 1812. *See id.* In a later decision the district court held that Sea Hunt could not rightfully claim a salvage award because Spain, as the acknowledged owner of JUNO, had expressly refused salvage services. The Kingdom of Spain now appeals the judgment concerning LA GALGA. The Commonwealth and Sea Hunt note a cross-appeal with regard to JUNO and the denial of a salvage award.

II.

In order for Virginia to acquire title to the shipwrecks and to issue salvage permits to Sea Hunt, these vessels must have been abandoned by Spain. Sea Hunt and the Commonwealth argue that the Abandoned Shipwreck Act requires application of an implied abandonment standard for shipwrecks in coastal waters, and that Spain has

abandoned LA GALGA and JUNO. Because Spain has asserted an ownership claim to the shipwrecks, however, express abandonment is the governing standard. *See Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450, 464-65 (4th Cir. 1992). To adopt a lesser standard would not only go beyond what the ASA requires. It would also abrogate America's obligations to Spain under the 1902 Treaty of Friendship and General Relations.

A.

Under the ASA, the United States asserts title to any abandoned shipwreck that is on or embedded in the submerged lands of a State. *See* 43 U.S.C. § 2105(a). Title is then automatically transferred to the State in whose submerged lands the shipwreck is located. *See id.* § 2105(c). "Submerged lands" for the purposes of the ASA includes coastal waters three miles from shore. *Id.* § 2102(f)(1), § 1301(a)(2). For a state to acquire title to a shipwreck it must be (1) abandoned and (2) on or embedded in the submerged lands of a state. *Id.* § 2105(a) & (c). It is undisputed that LA GALGA and JUNO are within Virginia's submerged lands. That, however, is not enough. We must address whether these frigates were abandoned by Spain. If the shipwrecks were abandoned, then Sea Hunt would have control over them in accordance with its state-issued permits.

The ASA does not define the critical term "abandoned." Nothing in the Act indicates, however, that implied abandonment should be the standard in a case such as this where a sovereign asserts ownership to its

vessels. The Act states in its findings that "abandoned shipwrecks" are those "to which the owner has relinquished ownership rights with no retention." 43 U.S.C. § 2101(b). The statute thus provides that a shipwreck is abandoned only where the owner has relinquished ownership rights. When an owner comes before the court to assert his rights, relinquishment would be hard, if not impossible, to show. Requiring express abandonment where an owner makes a claim thus accords with the statutory text. Further, although the legislative history states that abandonment may be implied, it may be implied "as by an owner never asserting any control over or otherwise indicating his claim of possession." H.R. Rep. No. 100-514(I), at 2 (1988), reprinted in 1988 U.S.C. C.A.N. 365, 366. An owner who comes forward has definitely indicated his claim of possession, and in such a case abandonment cannot be implied.

The legislative history of the ASA suggests that sovereign vessels must be treated differently from privately owned ones. The House Report incorporates a State Department letter, which states, "the U.S. only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act; mere passage of time or lack of positive assertions of right are insufficient to establish such abandonment." H.R. Rep. No. 100-514(II), at 13 (1988), reprinted in 1988 U.S.C.C.A.N. at 381. The implications of this for other sovereign vessels is also underscored: "The same presumption against abandonment will be accorded vessels within the U.S. territorial sea that, at the time of their sinking, were on the non-commercial service of another State." *Id.* Under the ASA, then, an implied abandonment standard would seem least defensible where, as

here, a nation has stepped forward to assert ownership over its sovereign shipwrecks.

B.

Further, courts have held that the ASA "did not affect the meaning of 'abandoned,' which serves as a precondition for the invocation of the ASA's provisions." *Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel*, 177 F.3d 491, 499 (6th Cir. 1999). According to the Supreme Court, "the meaning of 'abandoned' under the ASA conforms with its meaning under admiralty law." *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 508, 140 L. Ed. 2d 626, 118 S. Ct. 1464 (1998). The Supreme Court never suggested that by conferring title to the states the ASA somehow altered the traditional admiralty definition of abandonment. While the common law of admiralty must be developed consonant with federal statutes, *see American Dredging Co. v. Miller*, 510 U.S. 443, 455, 127 L. Ed. 2d 285, 114 S. Ct. 981 (1994), here the ASA has not altered the admiralty law background.

Under admiralty law, where an owner comes forward to assert ownership in a shipwreck, abandonment must be shown by express acts. *See Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450 (4th Cir. 1992). "Should an owner appear in court and there be no evidence of an express abandonment," title to the shipwreck remains with the owner. *Id.* at 461. This principle reflects the long standing admiralty rule that when "articles are lost at sea the title of the owner in them remains." *The AKABA*, 54 F. 197, 200 (4th Cir. 1893). When "a

previous owner claims long lost property that was involuntarily taken from his control, the law is hesitant to find an abandonment." *Columbus-America*, 974 F.2d at 467-68; *see also Fairport*, 177 F.3d at 498; *Hener v. United States*, 525 F. Supp. 350, 356-57 (S.D.N.Y. 1981). An inference of abandonment is permitted, but only when no owner appears. *See Columbus-America*, 974 F.2d at 464-65 ("Should the property encompass an ancient and long lost shipwreck, a court may infer an abandonment. Such an inference would be improper, though, should a previous owner appear and assert his ownership interest. . . . ").

Appellees point us to no case applying an implied abandonment standard where a sovereign owner has come forward to assert a claim to its property. Although Sea Hunt and the Commonwealth characterize the rule of *Columbus-America* as an anomaly, it reflects well-established admiralty law doctrine and existing case law. For instance, in *Fairport* the Sixth Circuit adopted a test of "inferential abandonment." It emphasized, however, that there is a "uniform concern that courts impose a high burden on those who argue that an owner abandoned property that sank against his will." 177 F.3d at 499; *see also id.* at 500 ("Proof by inference still requires proof, not conjecture – a requirement bolstered by the exacting burden of proof admiralty law imposes on those who allege abandonment."). The Sixth Circuit also expressly limited its holding to "vessels formerly owned by private parties, and expressed no view as to the application of the express abandonment test to vessels initially owned by the United States." *Id.* at 500.

The First and Fifth Circuits have also never suggested that an implied abandonment standard would

govern in a case involving a claim by an original owner to its property. *See Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel,* 833 F.2d 1059, 1065 (1st Cir. 1987) (emphasizing that "no person or firm appeared to assert any overall claim of ownership"); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel,* 640 F.2d 560, 567 (5th Cir. 1981) (noting that "salvage of a vessel or goods at sea, even when the goods have been abandoned, does not divest the original owner of title or grant ownership rights to the salvor, except in extraordinary cases"). Appellees' attempts to glean a broad implied abandonment standard from circuit law overlooks one salient point – none of the cases they rely upon involved an original sovereign owner's claim to its shipwrecked vessels. To adopt an implied abandonment standard in this context would casually divest sovereigns of ships which sank against their will and to which they still lay claim.

C.

Finally, the express abandonment standard is required by Article X of the 1902 Treaty of Friendship and General Relations between the United States and Spain. Article X provides, "In cases of shipwreck, damages at sea, or forced putting in, each party shall afford to the vessels of the other . . . the same immunities which would have been granted to its own vessels in similar cases." Treaty of Friendship and General Relations, July 3, 1902, U.S.-Spain, 33 Stat. 2105. According to the United States Department of State, "this provision is unique" in that no other "friendship, commerce and navigation (FCN) treaty of the United States contains such a broadly worded

provision applying to State ships entitled to sovereign immunity." Statement of Interest, U.S. Dep't of State, ¶ 13 (Dec. 18, 1998). This treaty requires that imperiled Spanish vessels shall receive the same immunities conferred upon similarly situated vessels of the United States.

United States vessels may only be abandoned by an express, unambiguous, and affirmative act. Article IV of the Constitution states, "Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3. From this it follows that the Constitution precludes a finding of implied abandonment of federal lands and property – dispositions of federal property require some congressional action. "The United States cannot abandon its own property except by explicit acts." *See United States v. Steinmetz*, 973 F.2d 212, 222 (3d Cir. 1992). The Supreme Court has emphasized that the United States cannot be precluded from asserting its ownership rights by private property "principles similar to laches, estoppel or adverse possession." *United States v. California*, 332 U.S. 19, 39-40, 91 L. Ed. 1889, 67 S. Ct. 1658 (1947). The government "holds its interests here as elsewhere in trust for all the people," and thus cannot relinquish its property without express acts. *Id.* at 40. The House Report for the ASA also relates the understanding that "U.S. warships and other public vessels . . . require an affirmative act of abandonment." H.R. Rep. No. 100-514(II), at 5 (1988), reprinted in 1988 U.S.C.C.A.N. at 374. Thus, one of the immunities granted to United States vessels is that they will not be considered abandoned without a clear and affirmative act by the government.

Under the terms of the 1902 Treaty, Spanish vessels can likewise be abandoned only by express renunciation. Both Spain and the United States agree that this treaty provision requires that in our territorial waters Spanish ships are to be accorded the same immunity as United States ships. They also agree that such immunity requires application of the express abandonment standard. "When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." *See Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185, 72 L. Ed. 2d 765, 102 S. Ct. 2374 (1982). We cannot therefore adopt an implied abandonment standard in the face of treaties and mutual understandings requiring express abandonment. Such a standard would supplant the textual framework of negotiated treaties with an unpredictable judicial exercise in weighing equities.

Applying the express abandonment standard to sovereign vessels also respects the legitimate interests of the executive branch. While the ASA confers title to abandoned shipwrecks to the states, it does not vitiate important national interests or undermine the well-established prerogatives of sovereign nations. Department of Interior advisory guidelines on the ASA state that a sovereign vessel that appears to have been abandoned "remains the property of the nation to which it belonged at the time of sinking unless that nation has taken formal action to abandon it or to transfer title to another party." 55 Fed. Reg. 50116, 50121 (1990). The State Department has likewise emphasized that its policy is "to recognize claims by

foreign governments – such as in this case by the Government of Spain regarding the warships JUNO and LA GALGA – to ownership of foreign warships sunk in waters of the United States without being captured, and to recognize that title to such sunken warships is not lost absent express abandonment by the sovereign." Statement of Interest, U.S. Dep't of State, ¶ 9 (emphasis added). Further, the State Department notes, "U.S. domestic law is consistent with the customary international law rule that title to sunken warships may be abandoned only by an express act of abandonment." *Id.* ¶ 15.

In a case such as this, it is "not for the courts to deny an immunity which our government has seen fit to allow." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35, 89 L. Ed. 729, 65 S. Ct. 530 (1945) (involving an *in rem* admiralty action against foreign owned merchant vessel). Our Constitution charges the political branches with the conduct of foreign affairs. *See Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109-10, 92 L. Ed. 568, 68 S. Ct. 431 (1948). The express abandonment standard is regularly applied by the executive branch in dealing with foreign vessels. It is simply not for us to impose a looser standard that would interfere with this long standing political judgment in sensitive matters of international law.

III.

We now address whether there has been an express abandonment of LA GALGA.[1] The district court found that Spain had expressly abandoned LA GALGA in Article XX of the Treaty of 1763. *See Sea Hunt*, 47 F. Supp. 2d at 690. This interpretation, however, contravenes the plain language of the 1763 Treaty. It also flies in the face of the understandings of Spain and Great Britain, the relevant parties to Article XX. It impairs as well the respect that international law accords Spain's claim of ownership with regard to its shipwrecks and the military grave sites that they contain.

A.

Sea Hunt and Virginia must demonstrate express abandonment by "clear and convincing evidence." *Columbus-America*, 974 F.2d at 464; *see also Fairport*, 177 F.3d at 501; accord *Falgout Bros., Inc. v. S/V Pangaea*, 966 F. Supp. 1143, 1145 (S.D. Ala. 1997); *Hener*, 525 F. Supp. at 357. This is a high burden and an "exacting standard." *Fairport*, 177 F.3d at 501. The district court found such clear and convincing evidence of an express abandonment in the 1763 Definitive Treaty of Peace between

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[1] We affirm the district court's holding that JUNO was not expressly abandoned in the 1819 Treaty. Article II of that treaty transferred territory from Spain to the United States. But, as the district court noted, "Nothing in Article 2 implies that Spain has ceded anything other than territory and the structures erected on that territory." *Sea Hunt*, 47 F. Supp. 2d at 690. We agree that Spain did not expressly abandon JUNO in the 1819 Treaty for the reasons stated by the district court. *See id.* at 690-91.

France, Great Britain, and Spain, which ended the Seven Years War and transferred most of Spain's territories in the new world to Great Britain. *See Sea Hunt*, 47 F. Supp. 2d at 689 ("The sweeping language of Spain's cession in Article XX, together with the background of the complete change of sovereignty in the North American colonies, makes it unlikely that Spain intended to, or would have been allowed by Great Britain to maintain a claim of ownership over the wreck of LA GALGA. . . . ").

We disagree with the district court's interpretation. Article XX of the 1763 Treaty provides:

> His Catholick Majesty cedes and guaranties, in full right, to his Brittanic Majesty, Florida, with Fort St. Augustin, and the Bay of Pensacola, as well as all that Spain possesses on the continent of North America, to the East or to the South East of the river Mississippi. And, in general, every thing that depends on said countries and lands, with the sovereignty, property, possession, and all rights, acquired by treaties or otherwise. . . . So that the Catholick King cedes and makes over the whole to the said King and to the Crown of Great Britain, and that in the most ample manner and form. . . . It is moreover stipulated, that his Catholick Majesty shall have power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things.

Definitive Treaty of Peace, Feb. 10, 1763, Fr.-Gr. Brit.-Spain, art. 20, Consol. T.S. 331-32.

The plain language of this treaty provision contains no evidence of an express abandonment. First, Article XX does not include any of the common nouns that could

refer to LA GALGA. Notably absent are the terms "shipwreck," "vessels," "frigates," or "warships." Other provisions of the treaty mention these terms explicitly. For instance, Article III, which provides for the restoration of prisoners, states "all the ships of war and merchant vessels which shall have been taken . . . shall likewise be restored." *See also* Art. VIII (stating that the British may remove their belongings in "vessels"); Art. XIX (same). Further, the treaty also specifically catalogues items other than territory intended to be conveyed. For instance the treaty transfers control of "factories," Art. XI, "artillery," Art. XII, "fortresses," Art. XIX, "castles," Art. XXI, and "papers, letters, documents, and archives," Art. XXII. When the parties to the 1763 Treaty intended to cede non-territorial state property, they did so with great particularity. Yet nowhere does the treaty specifically mention the cession of "shipwrecks." "Express" is defined as "firmly and explicitly stated; particular, specific." Webster's II New College Dictionary 396 (1999). Without any mention of shipwrecks or any seagoing vessels it is hard to read Article XX as an express abandonment of LA GALGA.

Second, the cession of state property in Article XX is limited to all that Spain possesses "on the continent of North America." The plain meaning of this is that Spain ceded to Great Britain only what was located on land. Spain did not cede possessions in the sea or seabed. The district court focused on the fact that the "clause is a sweeping grant of territory and property," yet overlooked the "on the continent" limitation. This limitation excludes wrecks like LA GALGA that were located not on the continent, but in the seabed.

Sea Hunt and the Commonwealth urge that "on the continent" included coastal waters, and that consequently the 1763 Treaty constitutes an express abandonment of LA GALGA. Yet in a similar provision of the treaty, the parties specifically cede both land and the coasts. Article IV cedes French Canada to Great Britain and specifically provides for cession of "in general every thing that depends on the said countries, lands, islands, and *coasts*" (emphasis added). It also transfers all rights held "over the said countries, lands, islands, places, *coasts*, and their inhabitants" (emphasis added). By contrast, Article XX states that Spain cedes to Great Britain "in general, every thing that depends on the said countries and lands," and all rights "over the said countries, lands, places, and their inhabitants." There is no mention at all of coasts in Article XX.

Moreover, in light of eighteenth century understandings, this "on the continent" language would hardly amount to clear and convincing evidence of an express abandonment of property in coastal waters. In fact, the three-mile coastal belt, well-recognized today, had no clear counterpart in eighteenth century international law. Ownership of the three-mile belt in the eighteenth century was but a "nebulous suggestion." *United States v. California*, 332 U.S. at 32. When "in 1776 the American colonies achieved independence and when in 1783 the Treaty of Paris was concluded, neither the British crown nor the colonies individually had any right of ownership of the seabed of the sea adjacent to the American coast." Report of Special Master Maris, O.T. 1973, No. 35 Orig. at 47, adopted by *United States v. Maine*, 420 U.S. 515, 43 L. Ed. 2d 363, 95 S. Ct. 1155 (1975). Sovereign rights to the

territorial sea were not established in international law until some time in the nineteenth century. *See California*, 332 U.S. at 33; accord *Maine*, 420 U.S. at 524. Nineteenth century and present-day views of territorial cession are hardly dispositive of what mid-eighteenth century treaty signatories intended. *See Shively v. Bowlby*, 152 U.S. 1, 57, 38 L. Ed. 331, 14 S. Ct. 548 (1894); *United States v. Angcog*, 190 F. Supp. 696, 698 (D. Guam 1961).

Third, Article XX provides that Spain ceded "every thing that depends on the said countries and lands." The district court found that this included the wreck of LA GALGA. *See Sea Hunt*, 47 F. Supp. 2d at 689. It is anything but clear, however, given eighteenth century understandings, that "every thing that depends" can be interpreted to include this shipwreck. When interpreting this same clause of Article XX, Chief Justice Marshall noted, "By the 20th article of the [1763] treaty, Spain ceded Florida, *with its dependencies*, and all the country she claimed east or south-east of the Mississippi, to Great Britain." *Johnson and Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 584, 5 L. Ed. 681 (1823) (emphasis added). At the time, "dependencies" meant other territories that were dependent upon the sovereign country. A dependency was "a territory distinct from the country in which the supreme sovereign power resides, but belonging rightfully to it, and subject to the laws and regulations which the sovereign may think proper to prescribe." *United States v. THE NANCY*, 3 Wash. C. C. 281, 27 F. Cas. 69, 71 (C.C.D. Pa. 1814) (No. 15,854); *see also Webster's II* 303 (defining "dependency" as a "territory or state under the jurisdiction of another country from which it is separated geographically"). Under the Supreme Court's relatively

contemporaneous interpretation, "every thing that depends" does not include Spanish property such as the shipwrecks, but rather refers to "dependencies" such as nearby islands.

Fourth, Article XX provides that "his Catholick Majesty shall have power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things." There is no deadline for the right to take this property away. Rather the right is guaranteed irrespective of the time elapsed. By contrast, other provisions of the Treaty specifically set time limits for certain actions. For instance, Article XX itself states that Spanish subjects may "bring away their effects, as well as their persons . . . the term limited for this emigration being fixed to the space of eighteen months." *See also* Art. VIII (providing four months for the demolition of fortresses); Art. XIII (eighteen months for the emigration of British subjects from Guadaloupe); Art. XXIV (providing different time periods for various "restitutions" and "evacuations"). His "Catholick Majesty," however, has no limitation whatsoever on the removal of state property. In treaty interpretation as in statutory interpretation, particular provisions may not be divorced from the document as a whole. *See Kolovrat v. Oregon*, 366 U.S. 187, 195-96, 6 L. Ed. 2d 218, 81 S. Ct. 922 (1961) (refusing to interpret a treaty provision in isolation). Where such specific time limits were included for a variety of different actions but not included for the clause at issue here, there is a strong presumption that no time limit applies.

In sum, Article XX does not contain "clear and convincing" evidence of express abandonment. While the language of Article XX encompasses a great deal of land

and property, it does not mention vessels or shipwrecks, nor does Article XX refer to Spanish property in the sea or on the seabed. Such general treaty language does not come close to an "express declaration abandoning title," *Columbus-America*, 974 F.2d at 464, and therefore cannot amount to clear and convincing evidence of an express abandonment.

B.

This view of the treaty is not ours alone. Both parties to Article XX of the 1763 Treaty agree that the Kingdom of Spain did not abandon LA GALGA. Such agreement is significant. When "the parties to a treaty both agree as to the meaning of a treaty provision . . . we must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Sumitomo Shoji*, 457 U.S. at 185; *see also El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 167, 142 L. Ed. 2d 576, 119 S. Ct. 662 (1999) (the terms of a treaty must be given a "meaning consistent with the shared expectations of the contracting parties" (internal quotation marks omitted)). "Treaties are contracts between sovereigns, and as such, should be construed to give effect to the intent of the signatories." *Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir. 1996). Postratification understandings of the contracting parties are traditionally considered as aids to treaty interpretation. *See El Al Israel Airlines*, 525 U.S. at 167.

After the district court issued its judgment, the United Kingdom issued a formal Diplomatic Note clarifying that Article XX of the 1763 Treaty "cannot be interpreted as involving an express abandonment by Spain of

its rights to the shipwreck of 'LA GALGA.' . . . The intention behind Article XX was to transfer sovereignty over the territories mentioned in that Article, and not to deal with, or otherwise affect, the quite separate issue of the ownership of shipwrecks on the waters adjacent to these or other territories in North America." Spain also issued a Diplomatic Note reaffirming its view that the 1763 Treaty "was not a cession or abandonment of H.M. Frigate 'LA GALGA' or other shipwrecked vessels of Spain." "While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." *Kolovrat*, 366 U.S. at 194. We decline to disregard the position of the relevant treaty signatories that Article XX was not intended to include movable property located in coastal waters. Given that their view accords with the language and structure of the Treaty itself, it can hardly be contended that Sea Hunt has put forward "extraordinarily strong contrary evidence," to rebut the parties' interpretation.

C.

Although we believe the standard of express abandonment controls in the circumstances of this case, it would be difficult under any test to conclude that LA GALGA was abandoned. The mere passage of time since a shipwreck is not enough to constitute abandonment. *See Columbus-America*, 974 F.2d at 461; *Fairport*, 177 F.3d at 499 (length of time "one factor among several relevant to whether a court may infer abandonment"). Spain attempted salvage after LA GALGA sank, maintained LA GALGA on its naval registry, and asserted a claim after

Sea Hunt brought its admiralty action. Moreover, the shipwreck lies scattered and buried in the sand beneath the water, and technology has only recently become available for its salvage. *See Yukon Recovery, L.L.C. v. Certain Abandoned Property*, 205 F.3d 1189, 1194 (9th Cir. 2000) ("Lack of technology is one factor to consider in determining whether inaction constitutes abandonment."). In other cases where abandonment was found for Spanish wrecks, Spain made no claim of ownership. *See Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978) (noting that "the modern day government of Spain has expressed no interest in filing a claim in this litigation as a successor owner"); *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953, 956 (M.D. Fla. 1993) (finding that "no one . . . asserted an interest in the alleged vessel"). By contrast, Spain has vigorously asserted its interest in the wreck of LA GALGA and wishes to maintain it as a sacred military gravesite. In light of these circumstances, even a finding of implied abandonment would be improper.

D.

The United States has strenuously defended Spain's ownership over these vessels. The government maintains that this is required by our obligations under the 1902 Treaty as well as general principles of international comity. The United States "is the owner of military vessels, thousands of which have been lost at sea, along with their crews. In supporting Spain, the United States seeks to insure that its sunken vessels and lost crews are treated

as sovereign ships and honored graves, and are not subject to exploration, or exploitation, by private parties seeking treasures of the sea." Amicus Curiae Br. of U.S. at 1. Protection of the sacred sites of other nations thus assists in preventing the disturbance and exploitation of our own. Here the government's interest is rooted in customary international law. *See* 8 Digest of U.S. Practice in International Law 999, 1006 (1980) (noting that interference with sunken military vessels, "especially those with deceased individuals," is "improper" and that foreign governments' requests to have such views respected "should be honored").

It bears repeating that matters as sensitive as these implicate important interests of the executive branch. Courts cannot just turn over the sovereign shipwrecks of other nations to commercial salvors where negotiated treaties show no sign of an abandonment, and where the nations involved all agree that title to the shipwrecks remains with the original owner. Far from abandoning these shipwrecks, Spain has vigorously asserted its ownership rights in this proceeding. Nothing in the law of admiralty suggests that Spain has abandoned its dead by respecting their final resting place at sea.

IV.

We reverse the judgment of the district court that the Kingdom of Spain abandoned the vessel LA GALGA. We affirm the judgment of the district court as to JUNO. Both

vessels remain the property of Spain.[2] The judgment of the district court is accordingly

AFFIRMED IN PART AND REVERSED IN PART.

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[2] We affirm the district court's denial of a salvage award to Sea Hunt. The district court found, "It is the right of the owner of any vessel to refuse unwanted salvage. Sea Hunt knew before bringing this action that the JUNO was a Spanish ship and that Spain might make a claim of ownership and decline salvage. . . . Because Sea Hunt had prior knowledge of Spain's ownership interests and had reason to expect Spain's ownership claim and refusal to agree to salvage activity on JUNO, Sea Hunt can not be entitled to any salvage award."

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
NORFOLK DIVISION

Case No. 2:98cv281

SEA HUNT, INC., Plaintiff,

v.

THE UNIDENTIFIED, SHIPWRECKED VESSEL OR VESSELS, their apparel, tackle, appurtenances, and cargo located within coordinates 38 degrees 01'36" North Latitude, 75 degrees 14'33" West Longitude; 37 degrees 57'21" North Latitude, 75 degrees 13'00" West Longitude; 38 degrees 01'36" North Latitude, 75 degrees 13'14" West Longitude; 37 degrees 57'33" North Latitude, 75 degrees 17'44" West Longitude and/or 37 degrees 55'00" North Latitude, 75 degrees 19'18" West Longitude; 37 degrees 54'09" North Latitude, 75 degrees 17'00" West Longitude; 37 degrees 51'21" North Latitude, 75 degrees 18'52" West Longitude; 37 degrees 51'20" North Latitude, 75 degrees 21'05" West Longitude, in rem, Defendant(s).

April 27, 1999, Decided

COUNSEL: For Plaintiff/Counter Defendant: Anthony F. Troy, Mays & Valentine, Richmond, Virginia.

For Plaintiff/Counter Defendant: David Kegebein Suteland, Mays & Valentine, Norfolk, VA.

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For United States, Amicus Curiae: Lawrence R. Leonard, Office of the US Attorney, Norfolk, VA.

For United States, Amicus Curiae: Barbara B. O'Malley, Department of Justice.

For Alpha Quest Corp., Richard L. Cook, Claimants: George Robert Leach, Williamsburg, VA.

For Kingdom of Spain, Claimant: Ralph Montgomery Muoio, James A. Goold, Covington and Burling, Washington, D.C.

OPINION AND ORDER

CLARKE, District Judge

This case is currently before the Court on Plaintiff Sea Hunt, Inc.'s Motion for Partial Judgement on the Pleadings and Claimant Kingdom of Spain's Motion for Summary Judgement. This matter is a dispute over the status of two shipwrecked vessels believed to be the remains of the Spanish vessels JUNO and LA GALGA, which were sunk in 1802 and 1750, respectively. Plaintiff Sea Hunt, Inc. ("Sea Hunt"), a maritime salvage company based in the Eastern Shore of Virginia, has located the shipwrecked vessels near the coast of Assateague Island and has obtained permits from the Virginia Marine Resources Commission ("VMRC"), an agency of the Commonwealth of Virginia, to conduct salvage operations and to recover historic artifacts from the wrecks. The Commonwealth of Virginia ("Virginia") has asserted a claim of ownership over the vessels, pursuant to the Abandoned Shipwreck Act of 1987 ("ASA"). *See* 43 U.S.C. §§ 2101-2106. Claimant Kingdom of Spain ("Spain") asserts that the wrecks of JUNO and LA GALGA have not been abandoned and remain the sovereign property of

Spain. The United States has filed two statements of interest and an amicus brief in support of Spain. Although there is a factual dispute between the parties as to whether the JUNO and LA GALGA are warships, that question is immaterial and does not prevent the Court from ruling on the current motions at this time.

Based on the arguments of the parties, pleadings, and the evidence before the Court, the Court FINDS that as a matter of law Spain has not abandoned, and therefore retains ownership over, the wreck believed to be the JUNO. The Court also FINDS, however, that Spain has expressly abandoned its claim to LA GALGA, title to which now rests with Virginia according to the ASA. Accordingly, Sea Hunt's Motion for Partial Judgement on the Pleadings is GRANTED in part and DENIED in part, and Spain's Motion for Summary Judgement is GRANTED in part and DENIED in part.

I. Factual and Procedural Background

The following facts detailing the history of JUNO and LA GALGA are drawn primarily from the affidavit of David Beltran Catala, Counsel for Judicial Affairs of the Embassy of Spain in Washington, D.C., and are not in dispute.

A. The Ships

1. LA GALGA

The fifty-gun frigate LA GALGA de Andalucia ("LA GALGA"), the "Greyhound" in English, was commissioned into the Spanish Navy in 1732. LA GALGA initially served as part of Spain's Mediterranean Fleet, but in 1736, she sailed for Buenos Aires to join squadrons patrolling the Atlantic and Carribean. For the next fourteen years LA GALGA served as a convoy escort, traveling mainly between Veracruz, Havana, and Spain's principal home naval base at Cadiz.

Under the command of Don Daniel Houny, an Irishman in the service of Spain, LA GALGA left Havana on its last voyage on August 7, 1750. LA GALGA was charged with escorting a convoy of merchant ships across the Atlantic Ocean to Cadiz, and carried on board the 2nd Company of the 6th Battalion of Spanish Marines. On August 18, 1750, the convoy ran into a hurricane near Bermuda. The storm separated the ships in the convoy and forced them westward towards the American coast. During the seven-day storm, LA GALGA lost three masts and began to take on water. Efforts to lighten the ship by pushing her cannons overboard were unsuccessful, and on August 25, 1750, LA GALGA sank off the coast of the Eastern Shore near the Maryland/Virginia border. Most of her crew and passengers were able to reach land safely.

Following the wreck, Captain Houny attempted to salvage items from the wreck, but was hindered in doing so by the pillaging and looting by local residents. In November, 1750, Captain Houny was able to procure the

assistance of Governor Ogle of Maryland in protecting the wreck, but before further salvage could be made a second storm came and broke up what was left of the ship, ending the salvage efforts. LA GALGA then lay undisturbed for almost 250 years, until the current salvage attempts by Sea Hunt.

2. JUNO

The JUNO was built in 1789. A thirty-four gun frigate, she entered the service of the Spanish Navy in 1790, and sailed with a squadron of ships across the Atlantic to Cartagena. JUNO served Spain for the next ten years in the Atlantic and Caribbean, traveling many of the same routes LA GALGA had traveled a half century earlier.

On January 15, 1802, JUNO set sail from Veracruz under the command of Don Juan Ignacio Bustillo, bound for Cadiz. A severe storm caused damage to JUNO, and forced her to put in at San Juan where she underwent repairs for seven months. On October 1, 1802, JUNO left San Juan, together with the frigate ANFIRIZA, again bound for Cadiz. JUNO's mission was to transport the Third Battalion of the Regiment of Africa, along with the soldiers' families and several other civilian officials, back to Spain after a long period of service abroad.

On October 19, 1802, a storm arose which separated JUNO and ANFIRIZA. The storm continued, and by October 22, 1802, JUNO was taking on water. Her crew was forced to jettison her cannons in an attempt to lighten the ship. On October 25, 1802, the battered JUNO encountered the American schooner LA FAVORITA. The two ships sailed westward together in the hopes of reaching an

American port in which to weather the rest of the storm. JUNO continued to take on water, however, and during a lull in the storm on October 27, 1802, Captain Bustillo ordered the passengers and crew of JUNO to begin transferring to LA FAVORITA. Only seven persons were able to transfer before the storm picked up and forced the ships apart, making further transfers impossible.

On the morning of October 28, 1802, LA FAVORITA lost sight of JUNO in a heavy fog. When the fog cleared, JUNO was gone, and would not be seen again. A total of 432 sailors, soldiers and civilians perished when JUNO sank. Although Spanish authorities ordered an investigation into the loss of JUNO, the location of the wreck was not discovered until the recent efforts by Sea Hunt.[1]

B. Procedural History

The current action was initiated by Sea Hunt with the filing of a Verified Complaint in Admiralty *In Rem* against the two wrecks on March 11, 1998. The complaint states five counts: 1) that according to the Abandoned Shipwreck Act, the Commonwealth of Virginia is the rightful owner of the shipwrecks, and Sea Hunt is entitled to the rights granted to it by the Virginia Marine Resources Commission; 2) that Sea Hunt is entitled to a liberal

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[1] The Court notes, however, that at least one other salvage company has claimed to have found the wreck of JUNO. *See Quicksilver International, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, No. 88-618-N (E.D.Va. filed Sept. 13, 1988). *See also* discussion infra Section II.A.

salvage award for voluntarily recovering artifacts which are in "marine peril;" 3) that Sea Hunt is entitled to an injunction prohibiting other salvors from attempting to recover artifacts from the wrecks; 4) that based on information and belief, the two wrecks are the remains of the Spanish frigates JUNO and LA GALGA, and Sea Hunt is entitled to declaratory judgement that Spain may no longer exercise sovereign prerogative over the wrecked vessels; and, 5) that Sea Hunt is entitled to declaratory judgement stating that no government other than the Commonwealth of Virginia, including the United States or any foreign sovereign, has jurisdiction to regulate salvage operations over the two shipwrecks.

On March 12, 1998, this Court issued an Order directing that a warrant be issued for the arrest of the shipwrecked vessels and artifacts, granting to Sea Hunt exclusive rights of salvage until further notice of the Court, and directing Sea Hunt to publish a general notice of the claim, and to send specific notice of the action to both the United States and Spain. By separate Orders of the same date, the Court appointed Sea Hunt as special process server and substitute custodian of the wrecks.

On May 11, 1998, a motion to intervene was filed by Alpha Quest, Inc. and Richard L. Cook ("Alpha Quest/Cook"), claiming ownership over the vessels in addition to asserting several claims against Sea Hunt. On May 13, 1998, a Verified Claim and an Answer were filed by Virginia, asserting that Virginia is the rightful owner of the wrecks under the Abandoned Shipwreck Act, and that its rights were being exercised through the permits issued to Sea Hunt by the VMRC. On May 18, 1998, the United States filed a Motion to intervene, and a claim on

behalf of Spain asserting ownership of the vessels.[2] In addition, the United States filed an answer asserting the United States' own interests in exerting regulatory authority over the wrecks, which lay near the boundaries of the Assateague Island National Seashore.[3] On May 20, 1998, an intervening complaint was filed by Virginia, asserting ownership over the shipwrecked vessels. On June 2, 1998, Alpha Quest/Cook filed an answer to Sea Hunt's complaint, together with several counterclaims. Sea Hunt filed an answer to Virginia's intervening complaint on June 15, 1998, in which it admitted Virginia's ownership of the shipwrecked vessels.[4]

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[2] The United States sought to represent Spain's interests in the wrecks according to what it believed to be its obligations under the Treaty of Friendship and General Relations Between the United States of America and Spain, signed July 3, 1902. *See* 33 Stat. 2105.

[3] The Pleadings filed by the United States were initially filed May 13, 1998 in the Alexandria Division of this Court. They were forwarded to the Norfolk Division, where they were filed on May 18, 1998.

[4] On July 14, 1998, this Court entered an Order clarifying several procedural matters: 1) Sea Hunt's answer to Virginia's intervening complaint was returned because it was not signed by local counsel of record; 2) Alpha Quest/Cook's motion to intervene was denied for failure to comply with Rule 24(c); 3) Spain's claim was not properly verified according to Supp. Adm. Rule (C)(6); 4) because the claim was defective, Spain's answer was premature; and 5) the United States' motion to intervene did not include a supporting verified claim, and was therefore denied. All parties were given 10 days for supplemental filings to correct the defects, and all of the relevant pleadings were re-filed.

On August 21, 1998, the United States filed a Motion to Modify the Preliminary Injunction of March 12, 1998, in order to allow the National Park Service to regulate the salvage operations off the Assateague Island National Seashore. Also on August 21, 1998, Sea Hunt filed a motion to Strike and Dismiss the United States' motion to intervene on its own behalf, a motion in opposition to the United States' motion to intervene on behalf of Spain, and a motion for Partial Judgement on the Pleadings dismissing the claim of Spain. Also on August 21, 1998, Sea Hunt filed a motion to strike and dismiss the motion to intervene, answer and counterclaims of Alpha Quest/Cook. This Court held a hearing on all pending motions on September 15, 1998.

At the September 15, 1998, hearing, a consent Order was entered dismissing several of Alpha Quest/Cook's counterclaims, without prejudice. On September 17, 1998 this Court entered an Order dismissing Alpha Quest/Cook's remaining claims, except for the verified claim of ownership of the vessels. *See Sea Hunt, Inc. v. Unidentified Vessel or Vessels*, 181 F.R.D. 325 (E.D.Va. 1998). On September 23, 1998, this Court granted Sea Hunt's motion to strike and dismiss the United States' motion to intervene on its own behalf. *See Sea Hunt, Inc. v. Unidentified Vessel or Vessels*, 182 F.R.D. 206 (E.D.Va. 1998).[5] Finally, on September 25, 1998, the Court denied the motion to intervene filed by the United States on behalf of Spain. *See Sea*

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[5] The September 23, 1998, Order was later modified by an Amended Opinion and Order on October 29, 1998. The modification was merely to clarify the Court's language, and did not affect the substance of the original Order.

Hunt, Inc. v. Unidentified Vessel or Vessels, 22 F. Supp. 2d 521 (E.D.Va. 1998). In the September 25, 1998, Order, the Court held that the United States did not have the authority to act as counsel to represent Spain's interests in this matter. The Court granted Spain 90 days to obtain counsel and to make an appearance on its own behalf, and advised the United States that if it wished to assert its interests in this action, it should do so through an amicus brief or other statement of interest.[6] Action on Sea Hunt's motion for partial judgement on the pleadings was delayed to allow Spain time to obtain new counsel and to respond.[7]

Spain responded through private counsel on December 23, 1998, with a motion to intervene, a verified claim and an answer on its own behalf. At the same time, Spain filed the instant Motion for Summary Judgement, and a brief in opposition to Sea Hunt's motion for Partial Judgement on the Pleadings. Also on December 23, 1998, the United States filed a motion for authorization to file a statement of interest and an amicus brief. On January 25,

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[6] The United States initially filed a notice of appeal of the September 25 Order, but withdrew the appeal on February 10, 1999, thus relieving this Court of any jurisdictional concerns it had during the pendency of the appeal. *See Sea Hunt v. Unidentified, Shipwrecked Vessel or Vessels, etc.*, No. 2:98cv281 (E.D.Va. March 5, 1999) (Order asserting jurisdiction).

[7] In "an abundance of caution," Sea Hunt filed a motion to renew its motion for partial judgement on the pleadings on February 16, 1999, after Spain had made an appearance through its own counsel. As the Court never dismissed Sea Hunt's original motion, the motion to renew was unnecessary.

1999, Sea Hunt filed a motion to dismiss the remaining claim of Alpha Quest/Cook.

On February 24, 1999, the Court entered a consent Order extending the time for scheduling a hearing on pending motions, and allowing Spain until March 15, 1999 to file any remaining briefs.[8] At a hearing on March 5, 1999, the Court granted the United States' motion to file an amicus brief and statements of interest, and scheduled arguments on all pending motions for April 1, 1999.

II. Preliminary Motions

Before the Court addresses the merits of the motion for partial judgment on the pleadings and the motion for summary judgment, the Court must dispose of one preliminary matter and three additional procedural motions brought by the parties.

A. Quicksilver

As a preliminary matter, the Court notes that it has pending before it another case in admiralty, *Quicksilver International, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel,* No. 88-618-N (E.D.Va. filed Sept. 13, 1988), in which this Court, in 1988, awarded to Quicksilver International, Inc. ("Quicksilver") exclusive salvage rights to an unidentified shipwrecked vessel located off the coast of Maryland. Subsequent to the Court's award of salvage rights in that case, Quicksilver reported to the

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[8] In addition, the February 24, 1999, Order waived the page limitations for briefs contained in Local Rule 7.

Court that based on its salvage operations and its investigation of other historical data, it believed the shipwreck it was salvaging to be the remains of the Spanish vessel JUNO. Sea Hunt, of course, believes that one of the shipwrecks that is the subject of the case at bar is, in fact, JUNO.

Prior to the April 1, 1999, hearing in the case at bar, the Court notified counsel for Quicksilver and counsel for Sea Hunt that both salvors or potential salvors were making claims to a Spanish vessel named JUNO. The Court requested that counsel for Quicksilver attend the April 1, 1999, hearing to assure the Court that the shipwrecks at issue in the two cases were indeed two separate and distinct shipwrecks. At the hearing, counsel for Quicksilver and Sea Hunt adequately assured the Court that they had conferred, compared locations, and determined that their clients were making claims against and were concerned with different shipwrecks. Counsel for Spain indicated that Spain believed that Sea Hunt, and not Quicksilver, had found the actual JUNO.

B. Alpha Quest/Cook

The only claim that Alpha Quest/Cook has remaining in this case is a verified claim of ownership to the sunken vessels. Sea Hunt filed a motion to dismiss this claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure based on their contention that Alpha Quest/Cook had made inconsistent factual representations to the Court with regard to the question of ownership. The Court need not reach that issue because at oral argument, counsel for Alpha Quest/Cook admitted to the Court that

their only interest in this case was that of obtaining some sort of salvage award from Sea Hunt based on the aid that Alpha Quest/Cook allegedly gave to Sea Hunt in obtaining salvage permits from Virginia. Alpha Quest/Cook admitted to the Court that they have no basis for asserting any claim of ownership or salvage rights over the sunken vessels. Consequently, when the Court suggested that Alpha Quest/Cook's best course of action would be to assert any claims they may have in a private action against Sea Hunt, Alpha Quest/Cook agreed. Thus, the Court hereby GRANTS Sea Hunt's motion to dismiss Alpha Quest/Cook and DISMISSES Alpha Quest/Cook's Verified Claim, without prejudice to Alpha Quest/Cook's right to bring certain other claims against Sea Hunt in a separate action.[9]

C. Sea Hunt's Motion to Strike Spain's Verified Claim

Sea Hunt has filed a motion to strike the verified claim of Spain on the grounds that Spain has failed to comply with Supplemental Admiralty Rule C (6) and with Local Admiralty Rule (e)(3) of the Eastern District of Virginia. Sea Hunt argues that Spain failed to verify its claim of ownership either under oath or by solemn affirmation in accordance with 28 U.S.C. § 1746. In response,

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[9] The Consent Order entered by this Court on September 15, 1998, dismissed Counts I, II, and III, and subparagraphs (b), (f), (g), and (h) of the prayer of counterclaim without prejudice. These are the only claims remaining from the original complaint which Alpha Quest/Cook may assert against Sea Hunt; all other claims were dismissed with prejudice.

Spain conditionally filed an amended verified claim which corrected the alleged defects.

Rule C (6) requires that a claim in admiralty "shall be verified on oath or solemn affirmation. . . . " Fed. R. Civ. P. C (6). Local Rules require that a complaint in admiralty filed under Rule (C) "shall be verified on oath or solemn affirmation by a party or by an authorized officer of a corporate party." LAR (e)(3). If a party chooses to verify the document by solemn affirmation, 28 U.S.C. § 1746 provides a method by which an unsworn document may nonetheless qualify as a properly verified document: the declarant must explicitly state that the statements contained therein are executed "under penalty of perjury." *See* 28 U.S.C. § 1746.

In Spain's Verified Complaint, David Beltran Catala, Counsel for Judicial Affairs of the Embassy of Spain in Washington, D.C., attempts to verify Spain's claim of ownership merely by stating that the claim is "subscribed to under oath. . . . " This verification shows neither that a formal oath was administered by one authorized to administer such oath nor that the document was signed "under penalty of perjury." Thus, this verification does not comply technically with either form of verification available under the admiralty rules.

Since the verification does not comply technically with the mandates of the pertinent admiralty rules, Sea Hunt's motion to strike the verification is GRANTED. In the interests of justice, however, the Court also GRANTS Spain's conditional motion to file an amended verification and DENIES Sea Hunt's request for dismissal of the now properly filed verified claim.

D. Factual Disputes

Finally, Spain has brought a motion to strike the "Notice of Filing" ("Notice") and accompanying affidavits submitted by Sea Hunt on March 15, 1999. In the Notice and affidavits, Sea Hunt asserts, arguably for the first time in this litigation, that JUNO and LA GALGA were not warships at the times of their respective sinkings and therefore not entitled to the special status and protections that the law affords to warships. Spain asserts that the factual issue Sea Hunt wishes to raise at this late stage of the litigation is not a "genuine" issue of material fact that would allow Sea Hunt to avoid summary judgment, *see* Fed. R. Civ. P. 56(c), but rather a "contrived" issue of fact created by Sea Hunt as a last minute attempt to avoid summary judgment. Spain argues further that Sea Hunt's affidavits clearly contradict the factual position that Sea Hunt has taken since the inception of this litigation.

The Court is concerned as to why Sea Hunt waited so long to bring this potential factual dispute to the Court's attention. However, for reasons set forth more thoroughly in the Opinion below, the Court finds it unnecessary to the disposition of this case to decide whether LA GALGA and JUNO were indeed warships at the time of their respective sinkings. Therefore, the Court DECLINES to rule on Spain's motion.

III. Abandonment of JUNO and LA GALGA

A. Definition of Abandonment

The crux of this case is the issue of abandonment. There is no doubt that at one point in time JUNO and LA GALGA belonged to Spain. The current ownership of the shipwrecks depends on whether Spain has abandoned its claim to the two vessels. Virginia's, and by extension Sea Hunt's, claim rests on the Abandoned Shipwreck Act of 1987 ("ASA"), a federal act. Under the ASA:

> the United States asserts title to any abandoned shipwreck that is –
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> (1) embedded in submerged lands of a State. . . .

43 U.S.C.A. § 2105(a) (West Supp. 1998). Title over a shipwreck covered under the ASA is transferred to the State in whose waters the wreck is located. *See* 43 U.S.C. § 2105(e). Thus, if this Court finds that JUNO and LA GALGA have at any time been abandoned by Spain, then according to the ASA, the wrecks belong to Virginia.[10] If, on the other hand, the Court finds that Spain has never abandoned JUNO and LA GALGA, then Spain retains ownership over them. The ASA itself does not provide a definition of "abandonment." Therefore, the Court must look to case law for guidance on determining the status of the shipwrecked vessels in this case.

The Fourth Circuit Court of Appeals has dealt extensively with the issue of abandonment in the case of

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[10] No party in this case has argued or otherwise implied that the wrecks of JUNO and LA GALGA are not "embedded in the submerged lands" of Virginia.

Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 461 (4th Cir. 1992), cert. denied, 507 U.S. 1000, 123 L. Ed. 2d 183, 113 S. Ct. 1625 (1993) ("Columbus-America"). That case is binding authority in this Court, and will be discussed in detail.

B. Columbus-America Discovery Group

Columbus-America involved the wreck of the S.S. CENTRAL AMERICA. The salvage of the wreck of the CENTRAL AMERICA has been the subject of considerable litigation.

The CENTRAL AMERICA sank during a storm in 1857 while on a journey from Havana to New York, loaded with passengers and gold from the California gold rush. The demise of the CENTRAL AMERICA was widely reported, not only because of the 425 passengers who died, but also because of the fortune in commercial and privately owned gold which was lost. The commercial shipments of gold were insured, and the underwriters promptly paid the claims arising from the wreck. The payment of the claims vested title to the gold in the underwriters, who unsuccessfully attempted to organize salvage efforts. Because the location and depth of the wreck was unknown, no serious attempts at salvage were mounted.

Beginning in the 1970s, interest in salvaging the wreck revived, and new technology made such an expedition feasible for the first time. Several private parties sought a relinquishment of the underwriters' rights to the gold. Although the underwriters negotiated with potential salvors, no agreements were ever reached. Finally, in

1987, the Columbus-America Discovery Group ("CADG") located the wreck in over 8000 feet of water, and filed an in rem action against the wreck on May 27, 1987, in this Court.[11] On September 29, 1989, the insurance underwriters filed claims with the court asserting their rights of ownership.[12] After a ten-day trial, the district court found that because the underwriters had apparently destroyed documents pertaining to the payment of claims on the CENTRAL AMERICA, and 130 years had passed without the underwriters attempting to claim the sunken cargo, their claim to the gold had been abandoned. Pursuant to the law of finds, the Court awarded the gold in its entirety to CADG. *See Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 742 F. Supp. 1327 (E.D. Va. 1990).

On appeal, the Fourth Circuit closely examined the law of salvage versus the law of finds as used by the district court. Salvage law, according to the Court, is applied "when ships or their cargo have been recovered from the bottom of the sea by those other than their original owners." *Columbus-America*, 974 F.2d at 459. Under salvage law, "the original owners still retain their ownership interests in such property. . . . " *Id.* The law of finds, in contrast, "expresses the ancient and honorable

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[11] After two years of salvage, CADG realized that they had found the wrong ship. Eventually, they discovered the actual wreck of the CENTRAL AMERICA, and obtained a salvage injunction for the new wreck site on August 18, 1989.

[12] The Superintendent of Insurance of the State of New York also appeared on behalf of several defunct insurance companies.

principle of finders, keepers," *Id.* (quoting *Martha's Vineyard Scuba HQ, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987)), and applies "only to maritime property which had never been owned by anybody. . . . " *Id.* The Court noted a "relatively recent trend in the law" which had "seen the law of finds applied to longlost and abandoned shipwrecks." 974 F.2d at 460. Finally, the Court recognized that "courts in admiralty favor applying salvage law rather than the law of finds." *Id.*

Having determined that "finds law is applied to previously owned sunken property only when that property has been abandoned by its previous owners," *Id.* at 461, the Court turned to a discussion of abandonment. According to the Court, abandonment in the case of a shipwreck "means much more than merely leaving the property, for it has long been established that when articles are lost at sea the title of the owner in them remains." *Id.* (quotations omitted). Furthermore, after a ship has been sunk, "lapse of time and nonuser are not sufficient, in and of themselves, to constitute abandonment." *Id.* (quotations omitted).

The Fourth Circuit in *Columbus-America* divided cases which applied the law of finds to shipwrecks into two categories. First were "cases where owners have expressly and publicly abandoned their property." *Id.* Second were cases where "no owner appears in court" to claim the shipwrecks. *Id.* Significantly, the Court pointed out that in the second category of cases, the absence of an owner:

> may give rise to an inference of abandonment, but should an owner appear in court and there be no evidence of an express abandonment, the law of salvage must be applied.

Id.

The Court then observed that the district court's opinion:

> appears to be the only reported decision involving salvaged treasure from ancient shipwrecks wherein a court has applied the law of finds despite the fact that the previous owner appeared in court. In all other finds law cases, no prior owner has appeared.

Id. at 462. A review of other finds law cases confirmed the Court's observation. The Court specifically discounted language from the Fifth Circuit in *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978), which indicated that lapse of time was a sufficient criteria for applying the law of finds,[13] because the court in *Treasure Salvors* made a point of noting that Spain, the previous owner of the wrecked vessel, had not appeared in court to assert an ownership claim.

Finally, after its extensive review of applicable law, the *Columbus-America* Court came to the following conclusion:

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[13] *See Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978) ("disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths.")

> When sunken ships or their cargo are rescued from the bottom of the ocean by those other than the owners, courts favor applying the law of salvage over the law of finds. Finds law should be applied, however, in situations where the previous owners are found to have abandoned their property. Such abandonment must be proved by clear and convincing evidence, though, such as an owner's express declaration abandoning title. Should the property encompass an ancient and longlost shipwreck, a court may infer an abandonment. Such an inference would be improper, though, should a previous owner appear and assert his ownership interest; in such a case the normal presumptions would apply and an abandonment would have to be proved by strong and convincing evidence.

974 F.2d at 464-65.

The Fourth Circuit in *Columbus-America* then held that the underwriters had not abandoned their claim to the gold, finding that after 134 years, the fact that documents proving the underwriters payment of claims could no longer be found was not enough to show an express abandonment under the "strong and convincing evidence" standard. *Id.* at 468.[14]

The statement of the law of abandonment by the Court in *Columbus-America* could not be clearer. Although the Court clearly allows for an inference of abandonment for shipwrecks which have been lost and undiscovered for some time, in a case where the original owner

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[14] CADG was, however, granted the right to compensation under the law of salvage, and the case was remanded for a determination of the amount of the salvage award. *Id.* at 468.

appears, abandonment may not be inferred, but must be proven, regardless of how long the ships have been lost, and regardless of the character of the vessel. The *Columbus-America* case makes no distinction between private vessels and public vessels such as warships. Because of the assertion of a universal rule of express abandonment, it is irrelevant in this case for the purpose of determining abandonment whether JUNO and LA GALGA were warships in the service of Spain at the time of their sinking.

Columbus-America is binding on this Court. Even so, this Court notes that it is not the only authority for a rule of express abandonment when an owner of a shipwreck appears in court to make a claim. In *Zych v. The Unidentified, Wrecked and Abandoned Vessel,* Believed to be the LADY ELGIN, 755 F. Supp. 213 (N.D. Ill. 1990), like in *Columbus-America,* an insurance company claimed ownership of a shipwreck on which it had paid claims at the time of the ship's sinking, in 1860. The court in *Zych* found that despite the fact that the insurers never attempted to locate or salvage the wreck, there was no evidence of an affirmative act "which indicates an intent by [the insurer] to abandon the wreck," and therefore the insurers retained title to the wreck. *Id.* at 216. Thus, in the only two cases which the Court has located in which the owner of a shipwrecked vessel has appeared to claim ownership, a rule of express abandonment has been applied.

The implication of the *Columbus-America* rule in this case is that, whether or not JUNO and LA GALGA are considered warships, their owner, the Kingdom of Spain, has appeared to claim ownership to them, and therefore

Sea Hunt, in pressing its claim for possession of the vessels under the law of finds, must show by "strong and convincing evidence" that the shipwrecks have been expressly abandoned by Spain. *Columbus-America*, 974 F.2d at 465. Unless Sea Hunt can do so, the Court must apply the law of salvage, which operates under the premise that "the original owners still retain their ownership interests in such property." *Id.* at 459.

IV. Applying the Express Abandonment Rule

Sea Hunt presents three grounds on which JUNO and LA GALGA have been expressly abandoned by Spain. First is the Definitive Treaty of Peace Between France, Great Britain and Spain, Fr.-Sp.-Gr. Brit., Feb. 10, 1763, 278 Parry's Consol. T.S. 279 ("1763 Treaty"). Second is the Treaty of Amity, Settlement and Limits Between the United States of America and His Catholic Majesty (the Kingdom of Spain), U.S.-Sp., Feb. 22, 1819, 8 Stat. 252, T.S. No. 327, 11 Bevans 528 ("1819 Treaty"). The third ground is the declaration of war by Spain against the United States in 1898.

A. 1763 Treaty

The 1763 Treaty between Great Britain, Spain and France ended the Seven Years War (also called the French and Indian War), and transferred several of Spain's territories in the new world to Great Britain. Sea Hunt claims

that Article XX of the 1763 Treaty constitutes an express abandonment of LA GALGA:[15]

> His Catholick Majesty cedes and guaranties, in full right, to his Britannick Majesty, Florida with Fort St. Augustin, and the Bay of Pensacola, as well as all that Spain possesses on the continent of North America, to the East or to the South East of the river Mississippi. And, in general, everything that depends on the said countries and land, with the sovereignty, property, possession, and all rights, acquired by treaties or otherwise, which the Catholick King and the Crown of Spain have had till now over the said countries, lands, places, and their inhabitants; so that the Catholick King cedes and makes over the whole to the said King and to the Crown of Great Britain, and that in the most ample manner and form . . . It is moreover stipulated, that his Catholick Majesty shall have power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things.

1763 Treaty, Art. XX.[16]

This clause is a sweeping grant of territory and property from Spain to Great Britain. Spain not only gave Great Britain its claims in Florida, but also "all that Spain possesses on the continent of North America, to the East

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[15] Because JUNO was not wrecked until 1802, its status is not affected by the terms of the 1763 Treaty.

[16] The Court has not quoted parts of Article XX dealing with the right of Spanish subjects in the ceded territory to keep their personal possessions and to continue to practice Catholicism unhindered by their new government.

or to the South East of the river Mississippi." In addition, not only the land was ceded, but "everything that depends" on the land.

These cessions were part of a wholesale redrawing of the map of North America by the three great colonial powers of 1763, Great Britain, France, and Spain. For example, in a like provision to Article XX, France ceded to Great Britain all of its possessions in Canada. *See* 1763 Treaty, Art. IV. France was allowed to keep its territory west of the Mississippi, including New Orleans, *see Id.*, Art. VII, while Great Britain returned to France several islands in the Carribean which had been conquered during the preceding war. *See Id.*, Art. VIII. In return for ceding all of Spain's possessions in North American east and southeast of the Mississippi River to Great Britain, the territory of Cuba was returned to Spain. *See Id.*, Art. XIX. Great Britain was the clear victor in North America, and the various terms of the Treaty imply that Great Britain was intended to have complete dominion over all of North America east of the Mississippi River.

The sweeping language of Spain's cession in Article XX, together with the background of the complete change of sovereignty in the North American colonies, makes it unlikely that Spain intended to, or would have been allowed by Great Britain to maintain a claim of ownership over the wreck of LA GALGA off the coast of Virginia. Spain had ceded its rights over everything it owned in North America east of the Mississippi, including its rights to sunken vessels.

Furthermore, both Spain and Great Britain actually knew where LA GALGA was located, and that it would

be included in the cession of property. LA GALGA was wrecked close to land, and her captain and crew had attempted to salvage much of what was left of the ship. In addition, Captain Houny called on the Governor of the colony of Maryland for assistance in keeping away the public while salvage was taking place. However, after a second storm arose and halted salvage efforts, they were never revived.

The last sentence of Article XX reserves for the King of Spain the right to "cause all the effects that may belong to him, to be brought away, whether it be artillery or other things." As has been discussed above, Spain knew the location of LA GALGA. Yet Spain made no attempt to "bring away" any of the remains of LA GALGA after the Treaty was signed. Thus, Spain waived the right to maintain its ownership over LA GALGA by failing to carry it away, and it was ceded with the rest of Spain's possessions to Great Britain.[17]

Article XX of the 1763 Treaty constitutes "strong and convincing evidence" under the *Columbus-America* standard of an express abandonment by Spain of its title to LA GALGA. LA GALGA is consequently an abandoned shipwreck, and belongs to Virginia under the terms of the Abandoned Shipwreck Act.

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[17] It is argued by Spain that the final provision of Article XX had no deadline and that the King of Spain could remove his property at any time. However, this would lead to the unlikely scenario that Great Britain intended to allow Spain to keep its "artillery and other things" in British territory indefinitely.

B. Treaty of 1819

The 1819 Treaty ended the conflict between Spain and the United States arising out of the War of 1812. The purpose of the 1819 Treaty was to "designate with precision the limits of their respective bordering territories in North America." 1819 Treaty, Preamble. The key provision of the 1819 Treaty is Article 2, which effected a transfer of territory from Spain to the United States:

> His Catholic majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him, situated to the Eastward of the Mississippi, known by the name of East and West Florida. The adjacent Islands dependant on said Provinces, all public lots and squares, vacant Lands, public Edifices, Fortifications, Barracks and other Buildings, which are not private property. . . .

1819 Treaty, Article 2.[18] This provision is much narrower than Article XX of the 1763 Treaty. In the 1819 Treaty provision, Spain specifically ceded only "territories," namely Florida, and not "all that Spain possesses" as in the 1763 Treaty. Nothing in Article 2 implies that Spain has ceded anything other than territory and the structures erected on that territory. Also, even though the 1819

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[18] It should be noted that this is the second time that Spain has ceded Florida. Spain initially ceded Florida to Great Britain in the Treaty of 1763. During the American Revolution, however, Spain recaptured Pensacola, and all of Florida was given back to Spain by treaty in 1784. In 1819, Spain again ceded Florida, this time to the United States. *See A Short History of Florida*, (visited Apr. 22, 1999) <http://dhr.dos.state.fl.us/flafacts/shorthis.html>.

Treaty again uses the description of territory "Eastward of the Mississippi," similar to the 1763 Treaty, it goes on to clarify that the territory being described is only that which is "known by the name of East and West Florida." As JUNO is located in Virginia and not Florida it is not affected by this Treaty.[19] Thus, Spain did not expressly abandon JUNO through the 1819 Treaty.

C. The Spanish-American War of 1898

In addition to the two treaties, Sea Hunt argues that the declaration of war between Spain and the United States in 1898 operated as an express abandonment of Spanish property in the United States. The existence of a state of war with Spain gave the United States the right to confiscate Spanish vessels in United States waters, and this right was exercised. By proclamation of April 26, 1898, President McKinley gave Spanish merchant vessels until May 21, 1898 to leave United States waters, or be confiscated:

> Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage, if, on examination of their papers, it shall appear that their cargoes

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[19] As LA GALGA was abandoned by the 1763 Treaty, it is not necessary to discuss its status under the 1819 Treaty. However, as it is located very near JUNO, it is clear that the two wrecks would be treated the same under this Treaty, and therefore neither was abandoned by the 1819 Treaty.

> were taken on board before the expiration of the above term; provided that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy. . . .

30 Stat. 1770-71.

Neither party doubts that the President had the power to order confiscation of Spanish merchant vessels at the outbreak of war. There is a question, however, of whether the United States had the right to confiscate Spanish warships, and whether President McKinley intended to do so through the Proclamation. Sea Hunt contends that the Proclamation issued by President McKinley did not mention warships, because it was clear under international law that warships were automatically forfeited. Spain argues to the contrary that the Proclamation did not apply to warships, as it was restrained by its language to merchant vessels. In any event, it is clear to the Court that it is within the bounds of the law to confiscate a warship or a merchant vessel belonging to the enemy during time of war. *See The PANAMA*, 176 U.S. 535, 44 L. Ed. 577, 20 S. Ct. 480 (1900); *The PAQUETE HABANA*, 175 U.S. 677, 44 L. Ed. 320, 20 S. Ct. 290 (1900); *United States v. Dewey*, 188 U.S. 254, 23 S. Ct. 415, 47 L. Ed. 463 (1903); *See also Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 1 L. Ed. 568 (1796). What is equally clear to the Court is that such confiscations are not automatic; and that an enemy vessel must actually be seized in order to be forfeited.

It has long been the law in the United States that a declaration of war alone does not work to seize enemy property. In *Brown v. United States*, 12 U.S. (8 Cranch) 110,

3 L. Ed. 504 (1814), Chief Justice Marshall articulated that rule as follows:

> It may be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confiscate the property of the enemy . . .

Id. at 125. Moreover:

> The proposition that a declaration of war does not, in itself enact a confiscation of the property of the enemy within the territory of the belligerent, is believed to be entirely free from doubt.

Id. at 127.

In contemporaneous cases dealing with the confiscation of Spanish vessels during the 1898 war, the vessels were explicitly captured by United States warships. *See The PANAMA*, 176 U.S. 535, 44 L. Ed. 577, 20 S. Ct. 480 (1900) (Spanish mail ship captured near Cuba by U.S. warship); *The PAQUETE HABANA*, 175 U.S. 677, 44 L. Ed. 320, 20 S. Ct. 290 (1900) (Two Spanish fishing vessels captured by U.S. blockading squadron near Cuba). Significantly, this is also the case for confiscation of enemy warships sunk in battle. *See United States v. Dewey*, 188 U.S. 254, 47 L. Ed. 463, 23 S. Ct. 415 (1903) (Spanish warships during the Battle of Manila Bay raised and captured as prizes by ships of the U.S. fleet); *See also United States v. Steinmetz*, 973 F.2d 212 at 217 (no such doctrine as 'constructive capture,' captor must have actual control over enemy ship to establish capture before sinking).

Whether JUNO was a warship or merchant ship is irrelevant in deciding this issue. There is no allegation by

Sea Hunt that the United States had actual control over the wrecks at any time during the hostilities of 1898, or thereafter. Without such actual possession by the United States, JUNO was not abandoned by Spain during the Spanish-American War of 1898. Thus, Spain retains ownership over JUNO.

IV. Conclusion

Regardless of whether or not JUNO and LA GALGA are considered to be warships, they are subject to a rule of express abandonment under the Fourth Circuit's precedent in *Columbus-America*. Sea Hunt has succeeded in showing by "strong and convincing" evidence that, through the 1763 Treaty, Spain has expressly abandoned title to LA GALGA. Therefore, title to LA GALGA now lies with Virginia under the Abandoned Shipwreck Act, and Sea Hunt may continue with its salvage efforts according to the terms of the VMRC permits. There has been no such evidence of abandonment, however, as to JUNO. Neither the 1819 Treaty nor the declaration of war in 1898 contain any evidence of an abandonment of JUNO by Spain. Therefore Spain retains title to JUNO's wreck, and Virginia has no claim to JUNO under the Abandoned Shipwreck Act. Sea Hunt may not, without Spain's permission, continue salvage operations on the remains of JUNO.

The question remains as to whether Sea Hunt is entitled to a salvage award for JUNO under traditional salvage law. Spain has specifically indicated that it wishes to treat JUNO as a maritime grave and does not want the wreck to be salvaged. As this issue has not been

fully argued by the parties, the question of whether Sea Hunt is entitled to an award under salvage law for salvage work performed on JUNO is expressly RESERVED, pending supplemental briefing by the parties. Each party to the case is ORDERED to submit a supplemental brief on the issue of whether Sea Hunt is entitled to a salvage award for JUNO within 30 days of the entry of this Order. The Court may require further evidence concerning the extent of the salvage conducted on JUNO. Amicus United States is also granted leave to submit a brief on this issue if it so chooses.

It is ORDERED, as to Spain's Motion for Summary Judgement that Spain retains title to and ownership of JUNO, and that its claim of ownership and title to LA GALGA is DENIED and DISMISSED. It is further ORDERED that Sea Hunt's Motion for Partial Judgement on the Pleadings is GRANTED to the extent that the Commonwealth of Virginia owns and has title to LA GALGA and was acting in accord with existing authority in issuing a salvage permit to Sea Hunt for LA GALGA.

The Clerk is DIRECTED to send a copy of this Order to all counsel of record in this case, as well as to counsel for Quicksilver.

IT IS SO ORDERED.

J. Calvitt Clarke, Jr.

United States District Judge

April 27, 1999

Norfolk, Virginia

Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101-2106 (2000)

Sec. 2101. Congressional statement of findings

The Congress finds that –

(a) States have the responsibility for management of a broad range of living and nonliving resources in State waters and submerged lands; and

(b) included in the range of resources are certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention.

Sec. 2102. Definitions

For purposes of this chapter [43 U.S.C. §§ 2101-2106] –

(a) the term "embedded" means firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof;

(b) the term "National Register" means the National Register of Historic Places maintained by the Secretary of the Interior under section 470a of title 16;

(c) the terms "public lands", "Indian lands", and "Indian tribe" have the same meaning given the terms in the Archaeological Resource Protection Act of 1979 (16 U.S.C. 470aa-470ll);

(d) the term "shipwreck" means a vessel or wreck, its cargo, and other contents;

(e) the term "State" means a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Northern Mariana Islands; and

(f) the term "submerged lands" means the lands –

(1) that are "lands beneath navigable waters," as defined in section 1301 of this title;

(2) of Puerto Rico, as described in section 749 of title 48;

(3) of Guam, the Virgin Islands and American Samoa, as described in section 1705 of title 48; and

(4) of the Commonwealth of the Northern Mariana Islands, as described in section 801 of Public Law 94-241 (48 U.S.C. 1681).

Sec. 2103. Rights of access

(a) Access rights

In order to –

(1) clarify that State waters and shipwrecks offer recreational and educational opportunities to sport divers and other interested groups, as well as irreplaceable State resources for tourism, biological sanctuaries, and historical research; and

(2) provide that reasonable access by the public to such abandoned shipwrecks be permitted by the State holding title to such shipwrecks pursuant

to section 2105 of this title, it is the declared policy of the Congress that States carry out their responsibilities under this chapter to develop appropriate and consistent policies so as to –

(A) protect natural resources and habitat areas;

(B) guarantee recreational exploration of shipwreck sites; and

(C) allow for appropriate public and private sector recovery of shipwrecks consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites.

(b) Parks and protected areas

In managing the resources subject to the provisions of this chapter, States are encouraged to create underwater parks or areas to provide additional protection for such resources. Funds available to States from grants from the Historic Preservation Fund shall be available, in accordance with the provisions of title I of the National Historic Preservation Act, for the study, interpretation, protection, and preservation of historic shipwrecks and properties.

Sec. 2104. Preparation of guidelines

(a) Purposes of guidelines; publication in Federal Register

In order to encourage the development of underwater parks and the administrative cooperation necessary for the comprehensive management of underwater resources related to

historic shipwrecks, the Secretary of the Interior, acting through the Director of the National Park Service, shall within nine months after April 28, 1988, prepare and publish guidelines in the Federal Register which shall seek to:

(1) maximize the enhancement of cultural resources;

(2) foster a partnership among sport divers, fishermen, archeologists, salvors, and other interests to manage shipwreck resources of the States and the United States;

(3) facilitate access and utilization by recreational interests;

(4) recognize the interests of individuals and groups engaged in shipwreck discovery and salvage.

(b) Consultation

Such guidelines shall be developed after consultation with appropriate public and private sector interests (including the Secretary of Commerce, the Advisory Council on Historic Preservation, sport divers, State Historic Preservation Officers, professional dive operators, salvors, archeologists, historic preservationists, and fishermen).

(c) Use of guidelines in developing legislation and regulations

Such guidelines shall be available to assist States and the appropriate Federal agencies in developing legislation and regulations to carry out their responsibilities under this chapter.

Sec. 2105. Rights of ownership

(a) United States title

The United States asserts title to any abandoned shipwreck that is –

(1) embedded in submerged lands of a State;

(2) embedded in coralline formations protected by a State on submerged lands of a State; or

(3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register.

(b) Notice of shipwreck location; eligibility determination for inclusion in National Register of Historic Places

The public shall be given adequate notice of the location of any shipwreck to which title is asserted under this section. The Secretary of the Interior, after consultation with the appropriate State Historic Preservation Officer, shall make a written determination that an abandoned shipwreck meets the criteria for eligibility for inclusion in the National Register of Historic Places under clause (a)(3).

(c) Transfer of title to States

The title of the United States to any abandoned shipwreck asserted under subsection (a) of this section is transferred to the State in or on whose submerged lands the shipwreck is located.

(d) Exception

Any abandoned shipwreck in or on the public lands of the United States is the property of the United States Government. Any abandoned

shipwreck in or on any Indian lands is the property of the Indian tribe owning such lands.

(e) Reservation of rights

This section does not affect any right reserved by the United States or by any State (including any right reserved with respect to Indian lands) under –

(1) section 1311, 1313, or 1314 of this title; or

(2) section 414 or 415 of title 33.

Sec. 2106. Relationship to other laws

(a) Law of salvage and the law of finds

The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 2105 of this title applies.

(b) Laws of the United States

This chapter shall not change the laws of the United States relating to shipwrecks, other than those to which this chapter applies.

(c) Effective date

This chapter shall not affect any legal proceeding brought prior to April 28, 1988.

Definitive Treaty of Peace, Feb. 10, 1763, Fr.-Gr. Brit.-Spain

42 Consol. T.S. 279, 331-32.

Article XX

His Catholick Majesty cedes and guaranties, in full right, to his Britannick Majesty, Florida with Fort St. Augustin, and the Bay of Pensacola, as well as all that Spain possesses on the continent of North America, to the East or to the South East of the river Mississippi. And, in general, everything that depends on the said countries and land, with the sovereignty, property, possession, and all rights, acquired by treaties or otherwise, which the Catholick King and the Crown of Spain have had till now over the said countries, lands, places, and their inhabitants; so that the Catholick King cedes and makes over the whole to the said King and to the Crown of Great Britain, and that in the most ample manner and form. His Britannick Majesty agrees, on his side, to grant to the inhabitants of the countries above ceded, the liberty of the Catholick religion: he will, consequently, give the most express and the most effectual orders that his new Roman Catholick subjects may profess the worship of their religion according to the rites of the Roman church, as far as the laws of Great Britain permit. His Britannick Majesty farther agrees, that the Spanish inhabitants, or others who had been subjects of the Catholick King in said countries, may retire, with all safety and freedom, wherever they think proper; and may sell their estates, provided it be to his Britannick Majesty's subjects, and bring away their effects, as well as their persons, without being restrained in their emigration, under any pretense whatsoever, except that of debts, or of criminal prosecutions: the term

limited for this emigration being fixed to the space of eighteen months, to be computed from the day of the exchange of the ratifications of the present treaty. It is moreover stipulated, that his Catholick Majesty shall have power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things.

Treaty of Amity, Settlement, and Limits, Feb. 22, 1819, U.S. – Spain

8 Stat. 252, T.S. No. 327, 11 Bevins 528, 529

Article 2

His Catholic majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him, situated to the Eastward of the Mississippi, known by the name of East and West Florida. The adjacent Islands dependant on said Provinces, all public lots and squares, vacant Lands, public Edifices, Fortifications, Barracks and other Buildings, which are not private property, Archives and Documents, which relate directly to the property and sovereignty of said Provinces, are included in this Article. The said Archives and Documents shall be left in possession of the Commissaries, or Officers of the United States, duly authorized to receive them.

Treaty of Friendship and General Relations, July 3, 1902, U.S.-Spain

33 Stat. 2105, T.S. No. 422, 11 Bevins 628, 632

Article X

In cases of shipwreck, damages at sea, or forced putting in, each party shall afford to the vessels of the other, whether belonging to the state or to individuals, the same assistance and protection and the same immunities which would have been granted to its own vessels in similar cases.

(2) (2)

Nos. 00-652 & 00-629

Supreme Court, U.S.
FILED
DEC 19 2000
OFFICE OF THE CLERK

In The

Supreme Court of the United States

SEA HUNT, INC.,

Petitioner,

v.

SPAIN,

Respondent,

and

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

SPAIN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE AMICI CURIAE PROFESSIONAL SHIPWRECK EXPLORERS ASSOCIATION, HISTORIC SHIPWRECK SALVAGE POLITICAL ADVISORY COMMITTEE, MEL FISHER ENTERPRISES, OLD WORLD SEARCH & RECOVERY, INC., SOUTHLAND MARINE, INC., COBB COIN COMPANY, INC., INTERSAL, INC., ENTERPRISE MARINE SERVICES, INC., QUICKSILVER INTERNATIONAL, INC., DEEP SEA RESEARCH, INC., AND LADY ELGIN FOUNDATION IN SUPPORT OF THE PETITION

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STATUTES

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I. STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professional companies and/or organizations engaged in the search for and recovery of historic shipwrecks and their cargo. The unprecedented Fourth Circuit Court of Appeals decision--deciding title prior to determining salvage rights, recognizing Spanish ownership of the long-lost shipwrecks, *LA GALGA* and *JUNO*, and permitting a sovereign not in actual possession thereof to prohibit their salvage--destroys the uniformity of admiralty law as unanimously established by this Court in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) (*"DSR"*).

Amici urge the Supreme Court to grant *Certiorari* as they have a vested interest in the predictability and uniformity of admiralty law and in the protection of the traditional--indeed, ancient--freedom of the seas to search for and rescue lost property from marine peril. A more

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[1] Pursuant to Supreme Court Rule 37.6, this brief was entirely written and paid for by *amici* and/or its counsel. Pursuant to Rule 37.3(a), *amici* have obtained the written consent of the parties for permission to file this brief.

detailed description of the individual *amici* is set forth in Appendix A.

II. SUMMARY OF ARGUMENT

Two years ago, in *DSR, supra.*, this Court established uniformity in this contentious realm of admiralty law, ruling unanimously that a sovereign--including the King of Spain--that did not have actual possession of a wreck site could not interfere with the finder's right to salvage it. 523 U.S. at 496-8. *DSR* clearly and unequivocally established that the first issue to be addressed in such litigation is the question of salvage rights. It is only after the completion of recovery operations that title to the shipwreck and its cargo--i.e., abandonment--is to be addressed. *Id.*

The decision below by the Fourth Circuit--and a nearly identical one by the Eleventh Circuit in *International Aircraft Recovery, LLC v. Wrecked and Abandonded Aircraft*, 218 F.3d 1255 (11th Cir. 2000), *Cert. pending*, No. 00-617--turns the unanimous *DSR* precedent on its

head, destroying the essential uniformity of admiralty law while thumbing its nose at the Supreme Court.

The very fact that four (4) separate petitions for *certiorari* have been filed this term on this very issue[2] demonstrates the importance of granting the instant petition and in no uncertain terms, reaffirming the uniformity of federal admiralty law as set forth by this Court in *DSR*.

ARGUMENT

III. THE FOURTH CIRCUIT'S DECISION DESTROYS THE UNIFORMITY OF ADMIRALTY LAW AS ESTABLISHED BY THIS COURT IN *DEEP SEA RESEARCH*

In *DSR*, an unanimous Supreme Court swept away a decade of confusing precedent in reaffirming a venerable, bright-line rule: where the property is *not in the actual possession* of the sovereign, that sovereign--be it a U.S. state, the federal government or U.S. Navy, or even a foreign nation like Spain--cannot interfere with the salvor's *in rem* salvage action. *DSR, Id.*

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[2] The other petitions, for which *certiorari* has been denied, are *Columbus-America Discovery Group, Inc. v. Atlantic Mutual Ins. Co., et al.*, No. 99-1935, *Cert. den.* 121 S.Ct. 277 and *Yukon Recovery, LLC v. Ocean Mar, Inc.*, No. 99-1958, *Cert. den.* 121 S.Ct. 62.

In contravention of this Court's clear rule, two appellate courts have each since permitted a sovereign claimant *without actual possession* of the wrecksite to enjoin the salvor in possession from carrying forward its recovery operations. In *International Aircraft Recovery, LLC v. Unidentified, etc. Aircraft*, 54 F.Supp.2d 1172 (S.D.Fla. 1999), the district court had found that the even if the United States Navy were still the owner of a rare World War II torpedo bomber found in international waters, it could not refuse its salvage: "[N]umerous cases hold that an owner may not refuse salvage services if no other provisions for rescue has been made and marine peril exists." *Id.* at 1179. More fundamentally, the district court noted that in light of *DSR*, it could not be disputed that "...the issue of abandonment and ownership are secondary to the question of whether this Court can protect the Plaintiff's ongoing federal salvage rights." *Id.* at 1179.

In reversing the district court, the Eleventh Circuit ignored any analysis of this Court's *DSR* decision, summarily dismissing the issue of sovereign possession

because it was not an Abandoned Shipwreck Act ("ASA") case!*Int'l Aircraft*, 218 F.3d at 1260. *But see, Sea Services of the Florida Keys, Inc. v. State of Florida*, 156 F.3d 1151, 1153 (11th Cir. 1998) [Florida cannot interfere with salvor's possession].

Of course, this Court's analysis made no such distinction: the rule applies to *any* claim asserted by *any* sovereign *without actual possession* of the property whose salvage is at issue. *DSR*, *supra.* at 496-8. It is undisputed that neither *LA GALGA* nor *JUNO* have been in the possession of Spain for well over two centuries. Nevertheless--without citing or in any way distinguishing *DSR*--the Fourth Circuit allowed Spain to refuse salvage and allowed no salvage award. *Sea Hunt*, 221 F.3d at 647-648. This is plain error.

The district court had also ruled that a non-possessing sovereign could refuse salvage--but cited cases finding abandonment of Spanish shipwrecks! *Sea Hunt*, 1999 U.S. Dist. LEXIS 21752 (E.D.Va. 1999). In each of

these cases[3] the owner was the state or federal government in whose submerged lands an *abandoned* Spanish shipwreck had been found. But this supports Virginia's and Sea Hunt's position that Spanish shipwrecks off the coast of North America have been abandoned. The cases *do not* support Spain's assertion that it can reject Sea Hunt's salvage of *LA GALGA* and *JUNO* where Spain: 1) does not possess them; 2) does not know where the shipwrecks are (like California in *DSR*); and, 3) has neither the wherewithal nor intent to rescue their remnants from the marine peril in which Sea Hunt has discovered them.

Ironically, only a year before its *Sea Hunt* decision, the Fourth Circuit ruled that, [T]he law of salvage presumes that the owner desires the salvage service." *RMS Titanic, Inc. v. Haver*, 171 F.3d 943, 963 (4th Cir. 1999). Presumptions notwithstanding, this Court has made it clear that irrespective of the King of Spain's desires, he cannot

---

[3] *See, Platoro,* 695 F.2d 893, 901 (5th Cir. 1983); *Lathrop v. Unidentified, etc. Vessel.* 817 F.Supp. 953, 964 (MD Fla. 1993); *Klein v. Unidentified Vessel,* 758 F.2d 1511, 1515 (11th Cir 1985); *Jupiter Wreck, Inc v. Unidentified Vessel,* 691 F.Supp. 1377, 1389 (SD Fla 1988).

unilaterally enjoin the salvage of the shipwreck sites that Sea Hunt has discovered and has maintained in its exclusive possession. *DSR*, 523 at 496-8.

IV. SPAIN CANNOT ASSERT OWNERSHIP OF UNIDENTIFIED SHIPWRECK SITES

Like *DSR, supra.* at 1469, *Sea Hunt* comes before the Court with a sparse, almost nonexistent record: there had been no discovery, no evidentiary hearings were held, and almost no testimony whatsoever was taken or otherwise a basis for the decision.

Although *DSR* was ultimately remanded to the district court to address the ultimate issue of the shipwreck's abandonment, the preliminary issue of salvage rights was fully adjudicated by the Court. In *Sea Hunt,* on the other hand, non-abandonment by Spain was found and the salvor in possession ordered not to knowingly disturb Spain's property (wherever that might be). 221 F.3d at 647.

Amici are troubled by the "rush to judgment" nature of the *Sea Hunt* litigation. Having disposed of the issue of the abandonment of *LA GALGA* pursuant to the 1763 Treaty between Great Britain and Spain, *Sea Hunt,* 17 F.Supp.2d at 688-690, the case was then set for further briefing on the question of Sea Hunt's salvage rights and the award due it with respect to the discovery of *JUNO.* But the court did not convene any hearing to assess the quantum of the salvage award due. Nor was any testimony taken as to the identity and physical parameters of the wreck site. Indeed, what little testimony of record there is on *JUNO* comes from Sea Hunt President Benson's statements made at the *ex parte* admiralty arrest hearing on March 11, 1998 (J.A. at 69-75, 82) and again briefly during a September 15, 1998 hearing. Nevertheless, the evidence established that Sea Hunt had spent two years and over one million dollars using overseas archival researchers, archaeological consultants and state of the art technology in the search for and preliminary identification of wreck sites believed to be *LA GALGA* and *JUNO.*

The few artifacts recovered from the *JUNO* site include an encrusted anchor, a corroded cannon, and several conglomerates that have yielded an assortment of objects, including several Spanish silver coins, none of which postdate the 1802 sinking of *JUNO*. This paucity of evidence cannot support a conclusive finding that either *LA GALGA* or *JUNO* has been discovered. Nevertheless, the Fourth Circuit affirmed a zero percent (0%) salvage award without comment.[4] 221 F.3d at 647-8.

This is hardly the sort of evidence necessary to substantiate a claim of discovery of a particular historic shipwreck. The district court was not satisfied that the Spanish treasure galleon *ATOCHA* had been discovered without reviewing the results of decades of onsite searching and diving, the recovery of literally tens of thousands of artifacts, and ultimately, the matching of several of those

---

[4] This is yet another example of the lack of uniformity mischief that ensues when Circuit Courts fail to follow Supreme Court precedent: in *Int'l Aircraft Recovery, supra.*, 218F.3d at 1263-4, the Eleventh Circuit remanded for a salvage award adjudication under identical circumstances where the Fourth Circuit denied *any* salvage award for millions of dollars spent by Sea Hunt in locating (but not yet positively identifying) "Spanish" shipwrecks.

items with their description, serial number and weight as found on the ship's original cargo manifest. *Treasure Salvors, Inc. v. Unidentified, etc. Vessel*, 549 F.Supp. 919, 924-26 (S.D. Fla. 1981).

At best, Sea Hunt can only conclude that the wreck sites it has discovered are promising and may--at some time in the future--prove to be the long-lost Spanish frigates. For Spain to be satisfied that *JUNO* has been found at this preliminary juncture is even more mystifying. Spain has never had any divers visit either Sea Hunt site and has performed no archaeological research or examination of the artifacts recovered therefrom, either. In fact, Spain has no basis to assert, as it has, that Sea Hunt--as opposed to Quicksilver, Inc.--is the true finder of *JUNO*.

In *DSR, supra.* this Court established the procedures to be followed in adjudicating the salvage rights to an historic shipwreck. Inferior courts should not be permitted to bypass the initial question of salvage rights and then--in

the absence of any evidentiary hearing whatsoever--jump to a conclusion as to the identity of the shipwreck sites.

Moreover, the record is void of the evidence ordinarily compiled in assessing the salvage award due the finder. In *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., et al.*, 974 F.2d 450, 468-69, (4th Cir. 1992) (*"CADG"*), the Fourth Circuit remanded the case to the district court for a full evidentiary hearing on the quantum of the salvage award to be paid to the intrepid finders of the S.S. *CENTRAL AMERICA*. The Court noted that six ingredients of the salvage award come from *The BLACKWALL*, 77 U.S. (10 Wall.) 1, 13-4 (1869), and assess the salvor's labor and skill, the cost and difficulty of the operations, the degree of danger encountered, and the value of the property saved. There is virtually no testimony on record whatsoever as to any of these factors in the *Sea Hunt* litigation.

Following such an evidentiary hearing in *CADG*, the appellate court affirmed a salvage award to the plaintiff

salvor of 90% of the value of the insured shipments of gold recovered from the *CENTRAL AMERICA*. *CADG II*, 56 F.3d 556, 562 (4th Cir. 1995). Compare and contrast the voluminous record before both the district court and the Fourth Circuit which supported this unprecedented--but fully justified--salvage award with the utter lack of evidence to support its equally unprecedented salvage award of *zero* percent (0% (!)) granted to Sea Hunt.

At a minimum, if this Court is satisfied with Spain's conclusion that *JUNO* has been discovered by Sea Hunt, a remand for an full evidentiary hearing on the salvage award due Sea Hunt is required. Because it cannot be disputed that Spain does not have possession of the *JUNO* site, this salvage hearing cannot take place until Sea Hunt has completed its archaeological recovery operations.

V. THE FOURTH CIRCUIT'S UNIQUE TEST FOR ABANDONMENT IMPERILS THE UNIFORMITY OF U.S. ADMIRALTY LAW

With the sole exception of the decisions below in the instant litigation--U.S. admiralty courts have uniformly found that Spanish shipwrecks have long since been aban-

doned: "disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches the fiction to absurd lengths." *Treasure Salvors, Inc. v. Unidentified, etc. Vessel,* 569 F.2d 330, 337 (5th Cir. 1978)[1622 galleon *ATOCHA* abandoned]; *See also, Treasure Salvors v. Jordan,* 556 F.Supp. 1319, 1325 (S.D. Fla. 1983) [1622 galleon *MARGARITA* abandoned].

These contested cases finding abandonment of Spanish shipwrecks include: the 1554 Spanish fleet lost off Padre Island, Texas [*Platoro v. Unidentified Remains,* 614 F.2d 1051, 1055 (5th Cir. 1980)]; the 1690 Manila galleon *PILAR,* lost off Guam [*Marx v. Government of Guam,* 866 F.2d 294, 300 (9th Cir. 1988]; a late seventeenth century shipwreck wrecked off Jupiter Inlet, Florida [*Jupiter Wreck, supra.*]; the 1715 Plate Fleet off Florida's "Treasure Coast" [*Cobb Coin Co., Inc. v. Unidentified, etc. Vessel,* 525 F.Supp 186, 197 (S.D. Fla. 1981)]; the 1733 Fleet in Florida's Middle Keys [*MDM Salvage v. Unidentified, etc. Wreck,* 631 F.Supp. 308, 310 (S.D. Fla. 1986)]; three eighteenth century Spanish shipwrecks abandoned in

Maryland's territorial water--including *LA GALGA*! [*Subacqueous Exploration & Archeology, Inc. v. Unidentified Vessel*, 577 F.Supp. 597, 600 & n.2 (D.Md. 1983)]; an unidentified Spanish wreck from the 1770's discovered in Cape Canaveral National Seashore [*Lathrop, supra.* at 965]; and even an unidentified Spanish wreck of unknown vintage [*Lopez Soba v. Fitzgerald*, 1993 AMC 120 (P.R. 1992)].[5]

These judicial conclusions were not a surprise to Spain. Indeed, in 1965, its own U.S. Ambassador admitted that Spain had lost its claim to the shipwrecked 1715 fleet when it abandoned any attempt at recovery; now its ownership was strictly a matter of Florida law. J.A. 348, appended hereto at Appendix C.

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[5] British warships of similar vintage have uniform-ly been deemed abandoned. *See, Deklyn v. Davis*, 1 Hopk. Ch.154, 162 (N.Y. Ch. 1824) [1782 British frigate *HUSSAR* abandoned in New York's "Hell Gate"]; *Sub-Sal, Inc. v. HMS DEBRAAK*, C.A. No. 84-296-CMW (D.Del. 1992)[1798 British Brig-of-War HMS *DEBRAAK* abandoned off Cape Henlopen, DE]. And as recently as this month, the District of Rhode Island found an entire fleet of British warships sunk in Naragansett Bay to have been abandoned and thereby the property of Rhode Island pursuant to the Abandoned Shipwreck Act, 43 U.S.C. §2101 *et seq. State of Rhode Island v. Unidentified, etc Vessels*, C.A. No. 99-136T (D.R.I. Dec 1, 2000) [Appended hereto as Appendix B].

The Ambassador's reasoning is equally applicable to *LA GALGA*. Spain never asserted title to the sunken frigate when it was allegedly discovered off Ocean City, Maryland in *Subacqueous, supra*. Its Captain Houny returned to the wreck site, only to find "a late Storm having broke the Hull to Pieces" with its cargo of mahogany cast ashore and heavily salvaged by the locals. Houny recovered what he could from the wreck site; since further efforts were futile, the Spanish captain abandoned any attempt to salvage *LA GALGA*, thereby giving up any future claim by that sovereign to its shattered hull and cargo.

Title to *LA GALGA* need not turn upon modern interpretation of archaic treaty language, assessing the legal consequences of multiple wars and peaces between Spain and the United States, or even in judicial scrutiny of arcane arenas of international law. Admiralty law has always heretofore taken a common sense approach to the concept of abandonment: when the owner knows of the location of his property and has the technology reasonably at hand with which to recover it, but does not, it is considered to have been legally abandoned.

Thus, in *Fairport International Exploration, Inc. v The CAPTAIN LAWRENCE*, 72 F.Supp.2d 795, (W.D. MI 1999), a shipwreck dashed to pieces on an island was deemed abandoned--and hence, state property--after the owner made no salvage effort for decades. *See also, Wiggins v. 1100 Tons of Italian Marble*, 186 F.Supp. 452, 456 (E.D.Va.1960) [*CLYTHIA* abandoned after remaining visible but unsalvaged in Virginia surf zone]; *Sindia Expedition, Inc. v. The SINDIA*, 895 F2d 116, 117 (3d Cir. 1990) [Windjammer abandoned in surf zone]; *Moyer v. ANDREA DORIA*, 836 F.Supp. 1099 (D.N.J. 1993) [location of sunken Italian liner never lost; deemed abandoned by underwriters in face of indifference to persistent and successful salvage]; *Bemis v. RMS LUSITANIA*, 884 F.Supp. 1042, 1049 (E.D. Va. 1995) [same].

The unique test of abandonment below means that identically-situated property will be found abandoned everywhere except in the Fourth Circuit. This clearly frustrates both the intent of Congress in the ASA and the

underlying rationale for U.S. admiralty jurisdiction: the uniformity of maritime law.

V. CONCLUSION

For the foregoing reasons, Virginia's and Sea Hunt's Petitions for *Certiorari* should be GRANTED.

Respectfully submitted,

PETER E. HESS, Esq.
3 Mill Road
Suite 303
Wilmington, Delaware 19806
phone: (302) 777-1715
Counsel for Amici Curiae

APPENDIX A

DESCRIPTION OF *AMICI CURIAE*

The Professional Shipwreck Explorers Association ("ProSEA") and the Historic Shipwreck Salvage Political Advisory Committee ("HISSPAC") are organizations comprised of companies and individuals committed to protecting the right of private companies and persons to engage in the search for and responsible excavation and recovery of historic shipwrecks. ProSEA and HISSPAC have been active in the promulgation of international conventions and federal and state laws and regulations governing historic shipwrecks and the rights of finders and salvors thereto. These organizations see the uniformity of U.S. admiralty law and its recognition and protection of salvage rights as essential to the continued vitality of the emerging industry of historic shipwreck recovery.

Mel Fisher Enterprises is the Key West, Florida successor to the renowned Treasure Salvors, Inc., the company that single-handedly searched for, located and salvaged the lost *and abandoned* 1622 Spanish galleons

ATOCHA and *SANTA MARGARITA*--discovering the richest shipwrecks ever found while winning an epic legal battle over their ownership. The *Treasure Salvors* litigation established the bedrock of modern U.S. admiralty law governing historic shipwreck salvage while demonstrating the inherent flexibility of the venerable principles of salvage law to the recovery of shipwrecks of historic and archaeological significance. Mel Fisher Enterprises wants its hard-earned precedents protected for future generations of undersea explorers.

Old World Search & Recovery, Inc. and Southland Marine, Inc. are each sub-contractors to Mel Fisher Enterprises. Working under the protection of the United States District Court for the Southern District of Florida, these companies spent the 2000 salvage season conducting successful search and salvage operations on the *SANTA MARGARITA* site in the Florida Keys

Cobb Coin Company, Inc. is a sister corporation to Salvors, Inc. For decades, its vessels and divers have been

actively and successfully salvaging the *abandoned* shipwrecks of Spain's illfated 1715 Plate Fleet off the east central coast of Florida. Like *LA GALGA* and *JUNO* herein, the 1715 Fleet was lost in what has since become the territorial waters of the State of Florida. And like the Commonwealth of Virginia permits--pursuant to which Sea Hunt, Inc. searched for, discovered and began successful salvage operations on the Spanish frigate shipwrecks *JUNO* and *LA GALGA* at issue herein--Cobb Coin Co. has long conducted its own successful salvage operations in Florida waters under the authority of search and recovery permits issued by that state.

Similarly, both *amici* Intersal, Inc. and Enterprise Marine Services, Inc. have been granted exclusive search and recovery permits by the states of North Carolina and Alabama, respectively, to search for valuable Spanish shipwrecks believed lost in the coastal waters of those states. In fact, the target of Intersal's search efforts is the 1750 sister vessel to *LA GALGA, EL SALVADOR*. Intersal and Enterprise see the Fourth Circuit's open defiance of the

Supreme Court and its unprecedented finding of non-abandonment--and the even more astonishing salvage award of *zero* percent for Sea Hunt's discovery of a shipwrecks that may well prove to be the long-lost *JUNO* and *LA GALGA*--as presenting a clear and present danger to their own substantial investments of time and money into archival research, electronic sensing, permit negotiations and diving operations.

Ironically, Quicksilver International, Inc., a Virginia Beach-based salvage company, has also been searching for the *JUNO* and believes to have found the wreck far offshore of the purported location that Spain now asserts is the site of the sunken frigate. Quicksilver's own search and recovery efforts have been ongoing for more than a decade under the protection of the United States District Court for the Eastern District of Virginia in *Quicksilver International, Inc. v. Unidentified, etc. Vessel*, C.A. No. 88-618. In spite of Quicksilver's well-publicized claim of discovery of *JUNO,* the Spanish Embassy has expressed neither interest nor any opposition whatsoever to the claim

of discovery. *See, Sea Hunt v. Unidentified Shipwrecked Vessel(s),* 47 F.Supp.2d 678, 683-84 (E.D.Va. 1999).

Deep Sea Research, Inc. ("DSR") is the successful finder and salvor-in-possession of the California Gold Rush shipwreck, S.S. *BROTHER JONATHAN*, a vessel whose celebrated precious cargo spawned a legal battle with California decided by this Court in 1998. DSR joins in this *amicus* brief to protect the hard-earned precedent it won from an unanimous Court: a sovereign claimant to a shipwreck without possession thereof cannot prevent or otherwise interfere with its salvage. *DSR, supra.*

The Lady Elgin Foundation is a not-for-profit foundation that won title to its namesake shipwreck, one of the Great Lakes' most historic. Through a public and private cooperative venture, the Foundation is conducting the archaeological study and careful recovery of portions of the *LADY ELGIN* shipwreck for eventual display and curation in the Chicago area. It, too, is committed to protecting the admiralty law precedent which enabled it to

successfully defend its right to explore and salvage the *LADY ELGIN*.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

STATE OF RHODE ISLAND
Plaintiff

v. C.A. No. 99-136T

The Unidentified, Wrecked,
and Abandoned Vessels,
among which is believed to be
the Lord Sandwich which in turn,
is believed to have formerly have been
the **H.M.S. *ENDEAVOUR***, their apparel, tackle, furniture,
equipment, cargo, etc., located in Newport Harbor,
Defendants in rem

ORDER FOR FINAL JUDGMENT

This action having been commenced by the filing of a complaint within the admiralty and maritime jurisdiction of this Court and the concomitant issuance of warrant of symbolic Arrest of the Unidentified, Wrecked, and Abandoned Vessels, among which is believed to be the Lord Sandwich which, in turn, is believed to have formerly have been the H.M.S. Endeavour; and

The said wrecks having been duly taken into the Marshal's de jure constructive possession and then taken into de facto custody of a substitute guardian, the Rhode

Island Historic Preservation and Heritage Commission (an agency of the State of Rhode Island Historic Preservation and Heritage Commission (an agency of the State of Rhode Island), on April 6, 1999, and no defendants and/or potential claimants having come forward to plead, or to request an extension of time in which to do so, or in any way proceed in this action after the State of Rhode Island dutifully complied with the Supplemental Rules for Certain Admiralty and Maritime Claims Rule C(4); and

Rhode Island having received no answer within the time specified according to the Supplemental Rules for Certain Admiralty and Maritime Claims Rule C(6); and

Be is now over a year having passed since such notice has been given that there is no likelihood of any claimant to step forward and answer; and

The said Unidentified, Wrecked, and Abandoned Vessels, among which is believed to be the Lord Sandwich which, in turn, is believed to have formerly have been the H.M.S. Endeavour, their apparel, tackle, furniture, equipment cargo, etc., located in Newport Harbor having in fact been determined to be abandoned and qualifying under federal law through the Abandoned Shipwrecks Act 43 U.S.C. §§2101-2106 and through the Rhode Island Antiquities Act, R.I. General Laws §42-45, 1-4 to automatically give Rhode Island title to said wrecks, their

apparel, tackle, furniture, equipment cargo, etc. after title has passed into possession of the United States Government;

WHEREFORE BE IT HEREBY NOW THAT THIS HONORABLE COURT, does hereby

ORDER, ADJUDGE, AND DECREE Plaintiff, the State of Rhode Island, is the sole and only lawful, true, and right owner of the Unidentified, Wrecked, and Abandoned Vessels, among which is believed to be the Lord Sandwich which, in turn, is believed to have formerly have been the H.M.S. Endeavor, their apparel, tackle, furniture, equipment cargo, etc., located in Newport Harbor, and as such is entitled to an exclusive exercise of all proper and lawful rights, interests, and incidents of ownership in the said Unidentified Wrecked and Abandoned Vessels, their tackle, armament, apparel, cargo and other effects pertaining to them; and does hereby further

ORDER, ADJUDGE, AND DECREE that, save as may be expressly permitted and authorized by said plaintiff, the State of Rhode Island, which shall provide reasonable access to the public in accordance with the requirements of 43 U.S.C. §2103 (a), said defendants, and all future potential claimants of the world, shall cease and desist from entering, going upon, or in any other way exercising or attempting to exercise dominion over or control over the

said vessel the Unidentified, Wrecked, and Abandoned Vessels, among which is believed to be the Lord Sandwich which, in turn, is believed to have formerly have been the H.M.S. Endeavour, their apparel, tackle, furniture, equipment cargo, etc., located in Newport Harbor upon pain of contempt.

TO ENTER PER ORDER

12/1/00 _____
United States Dist. Judge

Presented by:

STATE OF RHODE ISLAND
By its Attorney General

SHELDON WHITEHOUSE
ATTORNEY GENERAL

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APPENDIX C

Note: this is the verbatim certified translation hereof, as appeared in the Joint Appendix filed before the Fourth Circuit Court of Appeals.

Washington, D.C.
January 11, 1965

THE AMBASSADOR OF SPAIN
WASHINGTON, DC
Number 3

Mr. D. Victor de Avenell
3345-14th Street
Vero Beach, FL 32960

Dear Sir:

Thank you for your kind letter of last December 20, which I read with extreme interest.

The legal question of the ownership of the treasure on the east coast of Florida can raise questions as to whether said state has rights to all or part of it, with or without compensation. I do not know what solution is found to this issue in the applicable law.

In any case, there is no doubt that the Spanish State may not claim any title to said treasure for the following reasons:

1) If the discovery is considered "marine salvage," the owner of the ship and/or merchandise would have lost all rights because he abandoned any attempt of recovery.

2) If the discovery is considered a discovery of a treasure in the territory (including the territorial waters) under the jurisdiction of a state, in this case the state of Florida, the laws of this state will determine title to the treasure.

In most cases extinctive prescription would act against any right possibly reclaimed by a previous owner.

Thank you again for your interest, and I remain.

Sincerely,

[signature]
Marquis de Morry del Val,
AMBASSADOR OF SPAIN

Supreme Court, U.S.
FILED
JAN 11 2001
OFFICE OF THE CLERK

Nos. 00-629 & 00-652

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA

v.

KINGDOM OF SPAIN

SEA HUNT, INCORPORATED

v.

KINGDOM OF SPAIN

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE KINGDOM OF SPAIN IN OPPOSITION TO CERTIORARI

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January 2001

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BRIEF OF THE KINGDOM OF SPAIN IN OPPOSITION TO CERTIORARI

The decision of the court of appeals rests on multiple, independent and settled principles of domestic and international law governing sovereign vessels and military gravesites. The court of appeals correctly applied these principles to affirm the Kingdom of Spain's ownership of its Royal Navy Frigates *La Galga* and *Juno* and its right to protect from commercial exploitation the final resting place of more than 425 Spanish soldiers, sailors and their dependents who died at sea in the service of their country.

To create the appearance of a conflict among the courts of appeals, Petitioner Commonwealth of Virginia ("Virginia") conflates cases applying a principle of implied abandonment where the owner of a vessel did *not* appear to protect its interests with cases in which the owner *did* appear – as the Kingdom of Spain did in this case – and proof of express abandonment was required. Virginia's Petition also ignores controlling treaties, case law and principles of international policy on which the court of appeals grounded its decision.

The court of appeals correctly held that the Royal Navy Frigates *La Galga* and *Juno* are the property of the Kingdom of Spain under at least five parallel lines of legal authority: the 1902 Treaty of Peace and General Relations Between Spain and the United States; the deference United States courts accord to understandings between other nations concerning the meaning and effect of treaties between those nations; the deference United States courts accord to military and foreign policy decisions of the Executive Branch; international law and custom concerning sovereign vessels and military gravesites; and the proper application of the Abandoned Shipwreck Act where a sovereign owner contests claimed abandonment of its vessels. No conflict among the

courts of appeals is presented by the court of appeals' application of these principles.

Petitioner Sea Hunt, Incorporated ("Sea Hunt") misreads *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), as somehow precluding a sovereign from appearing in an *in rem* proceeding to defend its ownership of a sovereign vessel. In this case, the Kingdom of Spain appeared before a U.S. court and submitted proof of ownership that was found to be dispositive. Accordingly, *Deep Sea Research* has no bearing on this case. Sea Hunt also misconstrues the admiralty law of salvage. In accordance with long-settled principles, the court of appeals correctly held that Spain was entitled to protect its vessels from commercial exploitation.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 221 F.3d 634.[1] Opinions of the district court are reported at 47 F. Supp. 2d 678 (Pet. App. 28-59) and 22 F. Supp. 2d 521. The district court's decision denying Sea Hunt's request for a salvage award is unreported. *See* App., *infra*, 1a-9a.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 2000. Pet. App. 2. The petitions for a writ of certiorari were filed on October 19, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] References to "Pet. App." are to the appendix to the Commonwealth of Virginia's Petition, No. 00-629.

COUNTERSTATEMENT OF THE CASE

1. The Royal Navy Frigates *La Galga* and *Juno* are commissioned warships of Respondent the Kingdom of Spain. The frigates sank in 1750 and 1802, respectively. At the time of their sinkings, each vessel was engaged in military service. Each vessel remains to this day on the rolls of the Navy of Spain. Under Spanish law, each vessel is public dominion property of the Kingdom of Spain. (C.A. App. 235, 229-30, 238-39).

a. *La Galga* was a fifty-gun frigate commissioned into the Spanish Navy in 1732. On her final voyage, *La Galga* was serving as escort to a convoy of merchant ships bound from Havana to Spain, providing protection from pirates. On board *La Galga* were the Second Company of the Sixth Battalion of Spanish Marines, royal property and military prisoners. On August 18, 1750, the convoy encountered a hurricane that scattered the ships and drove them westward towards Colonial America. Over the next week, *La Galga* lost her masts and rudder. On August 26, 1750, *La Galga* struck a shoal off Assateague Island, near the border between Virginia and Maryland, and sank. (C.A. App. 218-19; 423-24).

Most of those on board *La Galga* reached land and the wreck remained accessible for a month or more. From late August into October 1750, Captain Daniel Huoni unsuccessfully sought the assistance of the Virginia authorities to protect the wreck and to prevent looting. On November 3, 1750, Governor Ogle of Maryland pledged to send sheriffs to stop the looting, but a second storm scattered the wreck and ended all salvage efforts. The remains of *La Galga* were driven by storms and wave action into the seabed and became unrecoverable by then-existing salvage technology. (C.A. App. 147-53; 424-25; 429).

b. *Juno* was a thirty-four gun frigate built for the Royal Navy of Spain in 1789, at the outbreak of the Napoleonic Wars. *Juno* was assigned to Spain's Caribbean Fleet and spent the remainder of her military service on convoy escort duty. *Juno*'s final voyage began as escort to a convoy from Vera Cruz to Cadiz, but she suffered storm damage en route and put in to Puerto Rico for repairs, while the other ships continued on to Spain. After repairs were completed, *Juno* was assigned in October 1802 to serve as a troopship taking the soldiers of the Third Battalion of the Regiment of Africa and their families home to Spain from combat duty. East of Norfolk, Virginia, *Juno* encountered a fierce storm and disappeared at sea with more than 425 soldiers, sailors and military dependents on board. Over the next year, Spain's Consul General in Boston unsuccessfully canvassed United States ports for any reports of *Juno* survivors or sightings of wreckage. (C.A. App. 216-17).

2. Petitioner Sea Hunt is a commercial salvage firm that secured a permit from Virginia to take artifacts from *Juno* and *La Galga*, in return for granting Virginia a share of the proceeds. Through historical research, Sea Hunt was aware that both ships were Spanish Royal Navy vessels believed to have sunk in the vicinity of Assateague Island, Virginia. (C.A. App. 417-22; 423-30). On learning of Sea Hunt's proposed activities, the Kingdom of Spain advised that it objected to disturbance of *La Galga* and *Juno* and expressed its desire that their remains be left undisturbed as military gravesites. (C.A. App. 103, 104). Sea Hunt initiated this *in rem* action because it anticipated that Spain would claim ownership of *La Galga* and *Juno* and object to salvage. (C.A. App. 66, 73, 80, 82).

In March 1998, Sea Hunt initiated an *in rem* admiralty action seeking a declaratory judgment that *Juno* and *La Galga* had been abandoned and ceased to be sovereign vessels of Spain, and that they had become the property of Virginia or Sea Hunt under the Abandoned

Shipwreck Act or the law of finds. Pet. App. 33. In the alternative, Sea Hunt sought a salvage award giving it exclusive rights as salvor-in-possession to the vessels and their contents.

After filing its *in rem* claim, Sea Hunt conducted limited salvage operations. At a September 15, 1998 hearing concerning those operations, unrebutted expert testimony was presented by a National Park Service underwater archaeologist that Sea Hunt was using inappropriate and potentially destructive techniques to scour the seabed for artifacts that were endangering the remains of the vessels. (C.A. App. 181-97). At the request of the district court, Sea Hunt agreed to cease operations until ownership of *Juno* and *La Galga* had been adjudicated.

3. In response to the Sea Hunt and Virginia claims, Spain appeared in the district court and filed a verified claim that it is the owner of *Juno* and *La Galga*. In support of a motion for summary judgment and in opposition to a Sea Hunt and Virginia cross-motion, Spain provided the district court with documentary history of the vessels demonstrating that both had been commissioned naval vessels on active duty and had never been abandoned or stricken from the rolls of the Spanish Navy. Spain also demonstrated that under Spanish law *Juno* and *La Galga* are public dominion property of Spain that can only be ceded or abandoned by an express act authorized by Parliament. Spain also objected to commercial exploitation of the gravesites of its personnel. (C.A. App. 104; 105-26; 198-204; 214-34; 235, 238).

4. Central to this case and to the decision of the court of appeals are two treaties entered into by the Kingdom of Spain. Article X of the 1902 Treaty of Friendship and General Relations (33 Stat. 2105, 2110-11, 11 Bevans 628, 632) obligates each nation "in cases of shipwreck" to provide the vessels of the other nation with "the same assistance and

protection and the same immunities which would have been granted to its own vessels in similar cases." The understanding of the United States and Spain, affirmed by the court of appeals, is that this article obligates the United States to provide a Spanish sovereign vessel shipwrecked in United States waters with the same rights and immunities that the United States provides to its own sovereign vessels.

The earlier treaty is the 1763 Definitive Treaty of Peace, 42 Consol. T.S. 279 (Feb. 10, 1763) (C.A. App. 521-34) by which Spain, Great Britain, France and Portugal ended the Seven Years' War. To resolve the conflict between Spain and Great Britain, Great Britain agreed to withdraw its forces from Cuba (Article XIX) in exchange for the cession by Spain of claims to territory east of the Mississippi River "on the continent of North America." (Article XX). The 1763 Treaty expressly preserved Spain's ownership of moveable Royal Property in North America, providing that "[H]is Catholick Majesty shall have the power to cause all the effects that may belong to him, to be brought away, whether it be artillery or other things." (Article XX). In the district court, Diplomatic Notes of Great Britain and Spain documented each nation's common understanding that the Treaty was not a cession of *La Galga* from Spain to Great Britain. App., *infra*, 27a, 29a.

5. In support of Spain's ownership rights in *Juno* and *La Galga* and its right to refuse salvage, the United States submitted Statements of Interest on behalf of the Departments of State and Defense. The Department of Defense statement declares the policy of the United States that more than 16,000 sunken U.S. military vessels and aircraft sunk around the world, including uncounted military gravesites, remain United States property absent an authorized express declaration of abandonment. App., *infra*, 21a-22a. It also articulates the United States' policy to secure protection for its sunken sovereign vessels and aircraft from unauthorized disturbance by providing reciprocal

treatment to other nations: "The Department of Defense has a strong interest in ensuring that the *Juno* and *La Galga* are treated in the same way that we would want U.S. Navy, U.S. Army, U.S. Air Force and other submerged sovereign non-commercial United States wrecks in foreign waters to be treated." App., *infra*, 24a.

The Declaration of Interest of the Department of State states that Article X of the 1902 Treaty of Friendship and General Relations is "unique" among the many United States treaties of friendship, commerce and navigation with other nations and, in the view of the Department of State, "imposes on the United States the responsibility to afford to these . . . vessels [*La Galga* and *Juno*] the same assistance and protection and the same immunities which would be granted to sunken United States warships in the same location." App., *infra*, 13a, 14a.

6. The district court upheld Spain's ownership of *Juno* and its right to reject salvage, but ruled that *La Galga* had been expressly abandoned by Spain under the district court's interpretation of the 1763 Definitive Treaty of Peace. Accordingly, the district court ruled that *La Galga* had become the property of Virginia under the Abandoned Shipwreck Act. Pet. App. 50-53.

7. The court of appeals affirmed the district court's rulings upholding Spain's ownership of *Juno* and denying Sea Hunt salvage rights. The court of appeals reversed the district court's ruling that the 1763 Treaty abandoned *La Galga*. The court of appeals held that Petitioners had been required to show express abandonment under long-settled admiralty law principles reflected in *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450 (4th Cir. 1992), Pet. App. 11, and under the Abandoned Shipwreck Act's definition of "abandoned shipwrecks" as those "to which the owner has relinquished ownership rights *with no retention*." (43 U.S.C. § 2101(b))

(emphasis added). The court of appeals further held that, while an implied abandonment standard may be applied to privately owned vessels, an express abandonment standard is required "where, as here, a nation has stepped forward to assert ownership over its sovereign shipwrecks." Pet. App. 10-11. Express abandonment is also required under Article X of the 1902 Treaty, which confers on Spanish vessels "the same immunities" conferred upon similarly situated vessels of the United States. The immunities extended to Spain's vessels by the 1902 Treaty include the preclusion of implied abandonment of United States property under the Property Clause of the Constitution (U.S. Const. art. IV § 3). Additionally, the court of appeals held that application of an express abandonment standard to *La Galga* and *Juno* is required by the legitimate interests of the executive branch in respecting "the customary international law rule that title to sunken warships may be abandoned only by an express act of abandonment." Pet. App. 16 (quoting Statement of Interest, U.S. Dept. of State ¶ 15 (App., *infra*, 14a)).

Applying these principles, the court of appeals ruled that no express abandonment of *La Galga* had been shown. As to the Treaty of 1763, the court agreed with Spain and Great Britain that the cession in the Treaty of territory "on the continent of North America" "was not intended to include movable property located in coastal waters," an understanding which is consistent with this Court's rulings in the Submerged Lands cases that 18th Century North America territory did not include coastal waters. Pet. App. 24. Moreover, the court recognized that the closing proviso of Article XX of the Treaty includes an express reservation of Spain's rights to its movable property in North America. Pet. App. 22.

Finally, the court of appeals observed that, if implied abandonment were the applicable standard, "even a finding of implied abandonment would be improper" in this case. Pet. App. 25.

REASONS FOR DENYING THE WRIT

1. This Case Is Not An Appropriate Vehicle For Determining The Meaning Of "Abandonment" Under Admiralty Law.

Virginia urges the Court to grant review in this case to determine the meaning of "abandonment" under the Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298 (1988) (codified at 43 U.S.C. § 2101-2106 (1994)), and general admiralty law. *See* Pet. 8-25. In particular, Virginia urges the Court to grant review in order to decide whether abandonment may be implied from inaction over a period of time, or instead requires an express act by the owner of the sunken vessel. Pet. 10-15.

There are multiple reasons why this case is not an appropriate vehicle for deciding that issue. *First*, this case involves sunken warships of a sovereign nation, which may be abandoned only by express act of the sovereign even if privately-owned shipwrecks are subject to an implied abandonment standard. *Second*, the 1902 Treaty between the United States and Spain requires the application of an express abandonment standard in this case. And *third*, the choice of a legal standard does not ultimately matter in this case, because the vessels at issue were not abandoned even under an implied abandonment standard.

a. This Case Involves Sovereign Vessels.

The *Juno* and *La Galga* were frigates in the Spanish Navy. Indeed, both ships remain on the Spanish Naval Registry to this day. Even if sunken private vessels may be subject to a standard of implied abandonment, there are strong arguments that vessels owned by a sovereign nation – and, especially, warships of a sovereign nation – should

remain property of the sovereign absent an express act of abandonment.[2]

The United States Government takes the position that warships of a sovereign nation remain the property of the sovereign absent an express act of abandonment. The United States, in addition to appearing as an *amicus curiae* in support of Spain, has submitted formal statements of the foreign and military policy of the United States. App., *infra*, 10a, 20a. The Statement by the Department of Defense, signed by the Judge Advocate General of the Navy, sets forth the interest of the United States in honoring the principle that a nation's sunken naval vessels are sovereign property that may not be disturbed without express authorization from the sovereign. App., *infra*, 23a. The declaration observes that more than 1,500 sunken U.S. naval vessels and countless sunken aircraft are located around the world, and that it is important that "the United States and its constituent States [grant] reciprocal recognition of the sovereign title and ownership interests of other sovereign governments in their wrecks in United States waters." *Id.* The State Department submission, signed by the Deputy Assistant Secretary of State for Oceans, Fisheries and Space, declares that it is "the policy of the United States Department of State to recognize claims by foreign governments . . . to ownership of foreign

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[2] The legislative history of the Abandoned Shipwreck Act indicates that sovereign vessels are treated differently from other vessels. *See* Pet. App. 10 (quoting H.R. Rep. No. 100-514(II), at 13 (1988)) ("[T]he U.S. only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act; mere passage of time or lack of positive assertions of right are insufficient to establish such abandonment. . . . The same presumption against abandonment will be accorded vessels within the U.S. territorial sea that, at the time of their sinking, were on the non-commercial service of another State."). *See also* Brief of the United States, at 35 & n.25, *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) (No. 96-1400).

warships sunk in waters of the United States." App., *infra*, 12a. The statement further declares that "[i]t is in the foreign policy interest of the United States to honor the request of the Government of Spain" in this case that its sunken warships not be disturbed. *Id.* at 14a. Because this case involves a special kind of shipwreck – warships of a sovereign nation – there is no occasion for the Court to consider whether shipwrecks of all kinds are subject to a rule of implied abandonment.

b. An Express Abandonment Standard Is Required Under The 1902 Treaty Between the United States and Spain.

The court of appeals held that "express abandonment . . . is required [under the terms] of the 1902 Treaty of Friendship and General Relations between the United States and Spain." Pet. App. 13. The 1902 Treaty provides that "[i]n cases of shipwreck, . . . each party shall afford to the vessels of the other . . . the same immunities which would have been granted to its own vessels in similar cases." 33 Stat. 2105, 2110-11, 11 Bevans 628, 632. The U.S. Department of State informed the courts below "'that this provision is unique' in that no other 'friendship, commerce and navigation (FCN) treaty of the United States contains such a broadly worded provision applying to State ships.'" Pet. App. 13-14 (quoting U.S. Department of State, Statement of Interest ¶ 13 (App., *infra*, 13a)).

Both the United States and Spain agree that the Treaty provides that Spanish ships sunk in U.S. territorial waters are accorded the same immunity as U.S. ships sunk in U.S. waters. As the court of appeals noted, U.S. vessels "may only be abandoned by an express, unambiguous, and affirmative act." Pet. App. 14 (citing U.S. Const. art. IV § 3; *United States v. California*, 332 U.S. 19, 39-40 (1947); *United States v. Steinmetz*, 973 F.2d 212, 222 (3d Cir. 1992)). The court of appeals appropriately concluded: "We

cannot therefore adopt an implied abandonment standard in the face of treaties and mutual understandings requiring express abandonment. Such a standard would supplant the textual framework of negotiated treaties with an unpredictable judicial exercise in weighing equities." Pet. App. 15.

The court of appeals' interpretation of the 1902 Treaty is plainly correct. In any event, the lower court's resolution of this narrow issue, on which there is no circuit conflict, warrants no further review.

c. Spain Would Retain Ownership Of The Vessels At Issue In This Case Even Under An Implied Abandonment Standard.

The court of appeals concluded that "even a finding of implied abandonment would be improper" in the circumstances of this case. Pet. App. 25. As the court of appeals noted, the Kingdom of Spain strove to protect *La Galga* after she sank, maintained the ship on its Naval Registry, and "vigorously asserted" a claim of ownership when Sea Hunt commenced its *in rem* admiralty action. *Id.* The court of appeals also noted that the technology needed to find and recover the wreck only recently became available. *Id.*

The court of appeals' resolution of this fact-bound issue is correct and warrants no further review. Because the result in this case ultimately does not depend on whether the court applies a standard of express abandonment or implied abandonment, there is no reason for this Court to address that issue in this case.

* * *

In sum, before reaching the question whether sunken vessels may be abandoned by implication, the Court would have to (1) overturn the court of appeals' fact-bound determination that there has been no abandonment of the

vessels at issue in this case under an implied abandonment standard; (2) overturn the court of appeals' interpretation of the 1902 Treaty between the United States and Spain (a narrow issue on which the parties to the treaty are in agreement) and (3) consider whether warships of a sovereign nation are subject to an express abandonment standard even if privately-owned shipwrecks are subject to a less-demanding implied abandonment standard. Not one of these issues merits review. And there is no reason to think that this Court would disagree with the court of appeals' well-reasoned resolution of any of these issues, let alone all of them.

2. The Court of Appeals' Decision Does Not Create A Circuit Conflict.

Virginia asserts (Pet. 10-15) that the courts of appeals are in conflict over the question whether abandonment of shipwrecks may be implied rather than express. The court of appeals' decision in this case does not conflict with any decision of another court of appeals. Moreover, any disagreement among the circuits is less sharply defined, and less significant, than is suggested by Virginia's Petition.

As the court of appeals explained, the Fourth Circuit has not ruled out implied abandonment of a shipwreck in all circumstances. The Fourth Circuit has held that "a court *may* infer an abandonment" when the property is "an ancient and long-lost shipwreck." *Columbus-America*, 974 F.2d at 464-65 (emphasis added). The Fourth Circuit has declined to draw an inference of abandonment, however, when the owner appears in the *in rem* action and asserts a claim of ownership. *Id.* In reaching this conclusion, the Fourth Circuit has relied on the established rule that when an owner asserts a claim to property that was involuntarily taken from his control, "the law is hesitant to find an abandonment." Pet. App. 12 (quoting *Columbus-America*, 974 F.2d at 467-68).

As the Fourth Circuit observed, no other court of appeals has employed an implied abandonment standard against an owner that has appeared in an *in rem* action and asserted a claim to its property. Pet. App. 12. For that reason, the decision in this case does not conflict with any decision of any other court of appeals.[3]

In addition, as noted above, this case involves warships of a sovereign nation rather than privately-owned vessels. Because sovereign vessels are subject to an express abandonment standard even if privately-owned vessels may be subject to an implied abandonment standard, decisions holding that private vessels have been impliedly abandoned do not conflict with decisions, such as this one, applying an express abandonment standard to a sovereign warship.

Even as to privately-owned vessels, the Fourth Circuit's decision in *Columbus-America* does not represent a sharp departure from prior admiralty law or the decisions of other circuits. The Sixth Circuit has observed that "the apparent divergence of authority" between its decisions and those of the Fourth Circuit "masks a degree of underlying agreement." *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, in rem*, 177 F.3d 491, 499 (6th Cir. 1999). The Sixth Circuit's standard, like the Fourth Circuit's, "reveals a uniform concern that courts impose a high burden on those who argue that an owner abandoned property that sank against his will"

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[3] Petitioners and their amici repeatedly cite decisions in which the owner of the vessel did not come forward to contest the claim of abandonment. *See* Sea Hunt Pet. 16-17; Virginia Pet. 17; Professional Shipwreck Explorers Ass'n Amici at 13-14. In those cases, the courts may infer abandonment from the owner's failure to appear and therefore need not address whether express abandonment has been shown. These decisions have no bearing on whether express or implied abandonment is appropriate when, as here, the owner has appeared.

and requires parties alleging abandonment to meet "the exacting burden of proof admiralty law imposes on those who allege abandonment." *Id.* at 499-500. Similarly, the First, Fifth, and Ninth Circuits have inferred abandonment only in cases in which the original owner failed to appear and assert a claim of ownership. *See Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987) ("no person or firm appeared to assert any overall claim of ownership"); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir. 1981) (original owner does not lose title "except in extraordinary cases"); *see also Yukon Recovery, L.L.C. v. Certain Abandoned Property*, 205 F.3d 1189, 1194 (9th Cir.) (upholding original owner's claim to cargo), *cert. denied*, 121 S. Ct. 62 (2000) (No. 99-1958).[4]

In sum, this case differs from other decisions of courts of appeals in that the Kingdom of Spain, a sovereign nation, appeared in the admiralty court and asserted a claim to its sovereign vessels. No court of appeals' decision has applied a standard of implied abandonment in similar circumstances, and therefore the Fourth Circuit's decision in this case does not create a circuit conflict.

3. The Additional Issues Raised in Sea Hunt's Petition Merit No Further Review.

Sea Hunt raises two additional issues that plainly do not warrant this Court's attention. *First*, Sea Hunt asserts

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[4] The petition for a writ of certiorari in *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 203 F.3d 291 (4th Cir. 2000), urged the Court to grant review to resolve an asserted circuit conflict over whether abandonment may be implied as well as express. This Court recently denied the petition. 121 S. Ct. 277 (2000) (No. 99-1935).

(Sea Hunt Pet. 9) that "the Fourth Circuit is providing Spain a sovereign immunity and/or exemption from a direct proceeding *In Rem* against all vessels originally owned by Spain," contrary to this Court's decision in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998). Sea Hunt simply misreads this Court's decision in *Deep Sea Research*. That decision holds that a State's immunity from suit under the Eleventh Amendment does not extend to an *in rem* proceeding, at least if the *res* is not in the actual possession of the State. Assuming that the holding in *Deep Sea Research* applies with full force to a sovereign nation, the court of appeals' decision in this case is entirely consistent with *Deep Sea Research*. Spain did not contend that the district court lacked authority to determine ownership of the shipwrecks. Instead, Spain appeared before the court and submitted a claim to the *res*. The courts below considered Spain's proofs of ownership, evaluated Petitioners' counter-evidence, and ruled in favor of Spain on the merits. That is a very different matter from holding that the sovereign immunity of the Kingdom of Spain extends to *in rem* proceedings, or that Spain is "exempt" from *in rem* proceedings in admiralty. Sea Hunt's effort to manufacture a conflict with this Court's decision in *Deep Sea Research* is baseless.

Second, Sea Hunt's petition includes a lengthy and confused discussion of the law of salvage. *See* Sea Hunt Pet. 19-25. The court of appeals rejected Sea Hunt's claim to a salvage award in a footnote at the end of its opinion. Pet. App. 27 n.2. The court of appeals agreed with the district court that "[i]t is the right of the owner of any vessel to refuse unwanted salvage," and that "Sea Hunt had prior knowledge of Spain's ownership interests and had reason to expect Spain's ownership interests and refusal to agree to

salvage activity." *Id.*[5] The lower court's resolution of Sea Hunt's salvage claim is fact-bound, does not conflict with any decision of another court of appeals, and reflects the long-settled doctrine that the owner of a vessel, including a long-sunken vessel, has the right to reject a salvor's services. *See, e.g., Lathrop v. Unidentified Wrecked and Abandoned Vessel*, 817 F. Supp. 953, 964 (M.D. Fla. 1993); *Bonifay v. The Steamship Paraporti*, 145 F. Supp. 879, 882 (E.D. Va. 1956); *The Pohatcong*, 77 F. 996, 997 (S.D.N.Y. 1896); *New Harbor Protection Co. v. Steamer Charles P. Chouteau*, 5 F. 463, 464 (D. La. 1881); *The Yucatan*, 30 F. Cas. 893, 895-96 (S.D. Fla. 1847); *cf. Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1515 (11th Cir. 1985). No further review is warranted.

4. The Foreign Policy Implications Of This Case Counsel Against Further Judicial Proceedings.

"Our Constitution charges the political branches with the conduct of foreign affairs." Pet. App. 16 (citing *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109-10 (1948)). This case involves relations between the United States and the Kingdom of Spain, the interpretation of a treaty signed by both sovereigns, the shared understanding of Spain and Great Britain as to the terms of their 1763 Peace Treaty, and principles of international comity. The court of appeals recognized that "[t]he United States 'is the owner of military vessels, thousands of which have been lost at sea, along with their crews. In supporting Spain, the United States seeks to insure that its sunken vessels and lost crews are treated as sovereign ships and honored graves, and are not subject to exploration,

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[5] Amici Professional Shipwreck Explorers Ass'n *et al.* argue that a "non-possessing sovereign" cannot refuse salvage (Br. 5-6). The lower courts, however, correctly rejected this distinction as unsupported by precedent. *See* Pet. App. 27 n.2; App., *infra*, 3a.

or exploitation, by private parties seeking treasures of the sea.'" Pet. App. 25-26 (quoting Brief of the United States as Amicus Curiae, at 1). As the court of appeals recognized, "matters as sensitive as these implicate important interests of the executive branch." Pet. App. 26.

The court of appeals noted that "[t]he express abandonment standard is regularly applied by the executive branch in dealing with foreign vessels," and concluded that "[i]t is simply not for [the courts] to impose a looser standard that would interfere with this long standing political judgment in sensitive matters of international law." Pet. App. 16. *See also Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (It is "not for the courts to deny an immunity which our government has seen fit to allow."). In interpreting the relevant treaty provisions, moreover, the Fourth Circuit followed the principle that "'[w]hen the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation.'" Pet. App. 15 (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)). The Fourth Circuit concluded its opinion by reiterating that appropriate deference to the executive branch prevents a court from "just turn[ing] over the sovereign shipwrecks of other nations to commercial salvors where negotiated treaties show no sign of an abandonment, and where the nations involved all agree that title to the shipwrecks remains with the original owner." Pet. App. 26.

The same considerations of deference to the executive branch weigh against further judicial proceedings in this case. As the court of appeals recognized, the Kingdom of Spain "vigorously asserted its ownership rights in this proceeding," and "[n]othing in the law of admiralty suggests

that Spain has abandoned its dead by respecting their final resting place at sea." *Id.*[6]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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January 2001

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[6] The United States filed briefs as *amicus curiae* in support of the Kingdom of Spain in both the district court and the court of appeals. The Kingdom of Spain recognizes that the usual practice of the United States is not to file an amicus brief at the petition stage without an invitation from the Court. In view of the foreign policy and military implications of this case, the Kingdom of Spain respectfully requests that if the Court were inclined to grant the petitions, it invite the Solicitor General to file a brief expressing the views of the United States before granting review.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

SEA HUNT, INC.,

Plaintiff,

v.

THE UNIDENTIFIED SHIPWRECKED VESSEL OR VESSELS, etc. *in rem, et al.*,

Defendants.

Case No. 2:98cv281

June 25, 1999

OPINION AND ORDER

Before CLARKE, District Judge.

This case is currently before the Court on the issue of Plaintiff Sea Hunt, Inc.'s ("Sea Hunt") entitlement to a salvage award for locating and salvaging articles from the JUNO, a Spanish frigate which sank off the coast of Virginia in 1802.

By Order of April 27, 1999, this Court held that the Kingdom of Spain ("Spain") had never abandoned the wreck of the JUNO and retained ownership of the remains of the vessel. *See Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678, 1999 WL 257748

(E.D. Va. 1999).[1] By the same Order, this Court directed the parties to the case to submit briefs on the issue of whether Sea Hunt should receive a salvage award for services conducted on JUNO even though Spain retained ownership of the wreck. Pursuant to this Court's Order of June 7, 1999, the Court allowed the parties to file reply briefs on the same issue. All briefs having now been received and considered, the Court FINDS that because Spain communicated to Sea Hunt its desire that the wreck of JUNO should not be disturbed, Sea Hunt is not entitled to any award for services performed in contradiction to Spain's wishes.[2]

Although the "law of salvage presumes that the owner desires the salvage service," *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 961 (4th Cir. 1999), "potential salvors do not have an inherent right to save distressed vessels." *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953, 964 (M.D. Fla. 1993). A salvage award "may be denied if the salvor forces its services on a vessel despite the rejection of them by a person with authority over the vessel." *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 695 F.2d 893, 901 (5th Cir. 1983). The doctrine of rejection of salvage is an ancient one, and has been recognized by many courts. *See, e.g.*, *The YUCATAN*, 30 F. Cas. 893 (S.D. Fla. 1847); *The CHOTEAU*, 4 Woods 71, 9 F. 211 (C.C.E.D. La. 1881); *The POHATCONG* , 77 F. 996 (S.D.N.Y. 1896); *The INDIAN*, 159 F. 20 (C.C.A.5 1908); *Legnos v. M/V OLGA*

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[1] This Court also held that LA GALGA, a Spanish frigate which sank in 1750, had been explicitly abandoned by Spain.

[2] The parties raised a number of issues in their briefs, including whether Spain is entitled to sovereign immunity, and whether the wreck of JUNO should receive special treatment as a war grave. However, as the Court previously declined to address the nature of JUNO as a military vessel, and because common law principles are sufficient for decision on this matter, these issues will not be discussed.

JACOB, 498 F.2d 666 (5th Cir. 1974); *Consolidated Towing Co. v. Hannah*, 509 F. Supp. 1031 (W.D. Mo. 1981). This doctrine has also been previously recognized by this Court. *See Bonifay v. The PARAPORTI*, 145 F. Supp. 879 (E.D. Va. 1956) (parties attempting to salvage vessel contrary to owner's instructions were "gratuitous intermeddlers" and were entitled to no award). While a party may salvage a vessel without the express permission of the vessel's master or owner, *Merritt & Chapman Derrick & Wrecking Co. v. United States*, 274 U.S. 611, 613, 71 L. Ed. 1232, 47 S. Ct. 663 (1927) (absent express consent, salvage award may be granted when "under the circumstances, any prudent man would have accepted" the services), an unequivocal rejection of salvage services will normally be respected. *New Harbor Protection Co. v. The CHARLES P. CHOUTEAU*, 5 F. 463, 464 (D. La. 1881) ("If the master of a burning vessel prefers to allow her to burn rather than to permit outside parties to extinguish the flames, he may do so.").

Sea Hunt has argued in its briefs that a rejection of salvage services may only be accomplished when the owner or master is in actual possession of the vessel and in a position to rescue the property. While it is true that in most cases of rejection of salvage, the owner or master is in possession of the vessel, the Court finds that possession of the vessel in these cases is merely a circumstance of the rejection, and not a requirement. The Court has found no statement of law which requires that the master of a vessel be present to effectuate a rejection of salvage. In fact, the right to reject salvage has been recognized in cases involving long-lost shipwrecked vessels. *See Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1515 (11th Cir. 1985) (salvage award denied where the owner of the vessel "may not even have desired for the property to be rescued."); *see also Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 695 F.2d 893, 901 (5th Cir. 1983); *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817

F. Supp. 953, 964 (M.D. Fla. 1993); *Jupiter Wreck, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 691 F. Supp. 1377, 1389 (S.D. Fla. 1988).

In *Platoro* and *Lathrop*, the courts adopted the idea of "constructive rejection" of salvage. Constructive rejection "bars an award if the rejection was reasonably understood by a salvor." *Lathrop*, 817 F. Supp. at 964. In *Lathrop*, the wrecked vessel subject to salvage was located in submerged land belonging to the State of Florida and dedicated to the United States for use as a national park. The *Lathrop* court determined that the salvor was not entitled to an award because, based on the wreck's location within a national park, the salvor "should have known that the State of Florida, the presumed owner of the submerged lands and any property embedded in the soil, might refuse [the salvor's] offer to excavate the alleged vessel." *Id.* at 965.

In *Platoro*, however, a salvage award was granted despite a claim of constructive rejection. Although the *Platoro* court recognized the doctrine of constructive rejection, it found that in the case of a shipwrecked vessel in the submerged lands of the State of Texas, it was not reasonable for the salvors to conclude either that Texas was the owner of the vessel, or that applicable Texas statutes stated an intent to reject salvage services. *Platoro*, 695 F.2d at 902.

In this case, Sea Hunt knew from the outset of this action that JUNO was a Spanish vessel, *see Verified Complaint in Admiralty in Rem*, March, 11, 1998, at ¶ 29, and possibly of a military character. During the March 11, 1998, hearing before this Court, Sea Hunt expressed to the Court its concern that Spain might claim ownership and reject Sea Hunt's efforts at salvage:

> . . . in the event that the wreck is determined to not have been abandoned, we would like to have our salvage rights protected as of today given the fact that potentially a sovereign

> owner could claim that they are refusing salvage.

See Transcript of Proceedings, March 11, 1998, at 18, lines 14-17 (statement of Mr. Hess). As early as September 24, 1997, more than five months before the filing of the current *in rem* action, Sea Hunt was informed during negotiations with the National Park Service[3] that Spain might claim ownership of the wreck. *See Transcript of Proceedings*, September 15, 1998, at 186, lines 17-21 (testimony of Mr. Benson); *Supplemental Brief for the United States as Amicus Curiae*, attachment 2, May 27, 1999. Sea Hunt's knowledge of the origin of the wreck and of the potential claims of Spain lead this Court to believe that Sea Hunt should have known, and in fact did know, before the filing of this *in rem* action that Spain might refuse any salvage efforts made against JUNO.

In addition, Sea Hunt received express notice from Spain of Spain's intent to refuse salvage of JUNO. Sea Hunt filed a Verified Complaint in Admiralty with this Court on March 11, 1998. In that complaint, Sea Hunt represented to the Court that, "upon information and belief, one of the Defendant Shipwrecked Vessel(s) is that of the JUNO, a Spanish frigate that disappeared in the vicinity of the salvage sites in 1802." *Verified Complaint in Admiralty in Rem*, March, 11, 1998, at ¶ 29. On March 12, 1998, this Court entered an Order which recognized that Spain might have an interest in making a claim to the wreck of JUNO, and directed Sea Hunt to serve Spain with notice of the *in rem* action against the wreck. On May 18, 1998, this Court

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[3] Because the wreck of the JUNO was located in close proximity to the Assateague Island National Seashore, Sea Hunt entered into negotiations with the National Park Service to discuss salvage operations within the National Seashore's boundaries.

received Spain's answer to the Verified Complaint and Spain's claim of ownership of the wreck.[4] Attached to the claim of ownership was a copy of a Verbal Note from the Spanish embassy in Washington, D.C. to the United States Department of State, in which Spain stated its wish "that the remains of these vessels be treated as maritime graves and that their salvage not be authorized at this time." *Verbal Note*, May 8, 1998, attachment to *Claim of Spain as Owner of Shipwrecks and Contents*, May 18, 1998 (translation). Furthermore, on March 12, 1998, a letter was mailed from the National Park Service to Sea Hunt's president, which notified Sea Hunt that:

> Pursuant to your request, NPS [the National Park Service] contacted the Government of Spain and met with members of the Embassy on November 13, 1997. On February 26, 1998, NPS received a written response from the Government of Spain. The response states that the shipwrecks are sovereign vessels, property of the Government of Spain, and may not be salvaged or disturbed without authorization.

Supplemental Brief for the United States as Amicus Curiae, attachment 2, May 27, 1999.[5] Thus, no later than March 12,

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[4] For various reasons which need not be discussed here, this answer was later found by the Court to be defective. *See Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 22 F. Supp. 2d 521 (E.D. Va. 1998). For the purposes of this Order, however, it is only necessary to point out that the Verbal Note from Spain was received by Sea Hunt as of the date of the first defective answer.

[5] Sea Hunt has previously disputed that Spain was contacted by the NPS at Sea Hunt's request. Regardless, as a result of the NPS' contact with Spain, Sea Hunt was explicitly made aware of Spain's refusal of salvage.

1998, Sea Hunt had received an express communication of refusal of salvage services from Spain.

Sea Hunt argues that in this case, where the wreck of JUNO is not in a single location but rather scattered about the ocean floor among several other shipwrecks, it is impossible to determine if a particular artifact belongs to JUNO without first salvaging the artifact. In this regard, Sea Hunt refers the Court to the Ninth Circuit's decision in *Tidewater Salvage, Inc. v. Weyerhaeuser Co.*, 633 F.2d 1304 (9th Cir. 1980). In *Tidewater*, a dispute arose when several floating logs belonging to Weyerhaeuser were salvaged by Tidewater, a professional salvor, despite Weyerhaeuser's express communication that it did not want Tidewater to salvage its logs. On an issue of first impression for the Ninth Circuit, the court stated the following rule:

> An owner, acting as a prudent person, may refuse salvage assistance by completed communication to the prospective salvor at any time before the act of salvage. A refusal of assistance . . . is not completed, however, until the salvor, acting as a reasonable person, has determined, or could determine, the ownership of the object of salvage.

Id. at 1307. Not wishing to "discourage salvage as to all floating logs," the court found that:

> As applied to this case, there was no completed communication as to any one floating log until Tidewater, after taking the log aboard, discerned the Weyerhaeuser ownership.

Id. Therefore, since Tidewater had already completed salvage before the communication of refusal was completed, the court affirmed the grant of a salvage award for the floating logs. *Id.*

This Court is not persuaded by *Tidewater*'s reasoning. In *Tidewater*, the court was dealing with floating logs, and not with an inert sunken ship. The plaintiff and defendant in *Tidewater* had to act very promptly, whereas in the case at bar, Sea Hunt had time to contact Spain to determine Spain's wishes before beginning salvage. While the Court recognizes the difficulty of determining the origin of a particular artifact without first bringing it out of the water to examine it, a holding in this case similar to the Ninth Circuit's in *Tidewater* would in effect negate the right to refuse salvage, and would work to "subordinate the rights of the owner to those of the salvor." *Jupiter Wreck, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 691 F. Supp. 1377, 1389 (S.D. Fla. 1988). To allow an award for artifacts recovered under *Tidewater*'s reasoning would provide an incentive for a salvor to purposefully conduct salvage operations despite the owner's refusal. Furthermore, in a treasure salvage case, it could encourage potential salvors to intentionally remain ignorant of the ownership of a wrecked vessel in order to maintain salvage rights. That is certainly not in harmony with the purposes of salvage law. Therefore, this Court declines to apply the Ninth Circuit's reasoning in *Tidewater*.

It is the right of the owner of any vessel to refuse unwanted salvage. Sea Hunt knew before bringing this action that the JUNO was a Spanish ship and that Spain might make a claim of ownership and decline salvage. Before conducting any salvage operations pursuant to this Court's Orders, Sea Hunt received an express communication of refusal of salvage from Spain. Because Sea Hunt had prior knowledge of Spain's ownership interests and had reason to expect Spain's ownership claim and refusal to agree to salvage activity on JUNO, Sea Hunt can not be entitled to any salvage award. The Court realizes that this holding places a substantial burden on Sea Hunt, and places on potential salvors the risk of expending significant time

and resources in salvaging sunken objects for which they will not receive compensation. However, such is the risk inherent in treasure salvage.

For the foregoing reasons, this Court FINDS that Sea Hunt is entitled to no salvage award for salvage services previously conducted on JUNO, and Sea Hunt is DIRECTED to refrain from any further salvage efforts. Sea Hunt is ORDERED to deliver to Spain any artifacts salvaged from JUNO which are currently in Sea Hunt's possession. Should Sea Hunt inadvertently salvage artifacts from JUNO during the course of other salvage operations in the designated salvage areas, such artifacts will be turned over to Spain as owner of JUNO, and no salvage award will be required.

The Clerk is DIRECTED to send a copy of this Opinion and Order to all counsel.

IT IS SO ORDERED.

/s/ J. Calvitt Clarke, Jr.

United States District Judge

June 25, 1999
Norfolk, Virginia

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

SEA HUNT, INC.,

Plaintiff,

v.

THE UNIDENTIFIED SHIPWRECKED VESSEL OR VESSELS, their apparel, tackle, appurtenances, and cargo located within coordinates 38 degrees 01'36" North Latitude, 75 degrees 14'3" West Longitude; 37 degrees 57'21" North Latitude, 75 degrees 13'00" West Longitude; 38 degrees 01'36" North Latitude, 75 degrees 13'14" West Longitude; 37 degrees 57'33" North Latitude, 75 degrees 17'14" West Longitude
and/or
37 degrees 55'00" North Latitude, 75 degrees 19'18" West Longitude; 37 degrees 54'09" North Latitude, 75 degrees 17'00" West Longitude; 37 degrees 51'21" North Latitude, 75 degrees 18'52" West Longitude, 37 degrees 51'20" North Latitude, 75 degrees 21'05" West Longitude, *in rem*,

Defendant(s).

Case No. 2:98cv281

STATEMENT OF INTEREST OF THE
UNITED STATES DEPARTMENT OF STATE

I, Ambassador Mary Beth West, declare and say as follows:

1. I am the Deputy Assistant Secretary of State responsible for oceans affairs and have served in that position since October 1996. My current title is Deputy Assistant Secretary of State for Oceans, Fisheries and Space. I make this declaration on the basis of personal knowledge or information made known to me in the course of my official

duties. This declaration is submitted on behalf of the United States in the above-captioned case.

2. In my capacity as Deputy Assistant Secretary of State for Oceans, Fisheries and Space, I am responsible for United States policy pertaining to international maritime issues, including, but not limited to, the subject of sovereign warships and recognition of title thereto. As an attorney who previously served as an Attorney-Adviser in the Department of State's Office of the Assistant Legal Adviser for Oceans and Fisheries Affairs, I am also familiar with the United States position on the international law of the sea pertaining thereto.

3. In my current position I have been accorded the rank of Ambassador. As an attorney, I handled international legal issues in the State Department's Office of the Legal Adviser for over 12 years. I was also a visiting Professor of Law at the University of New Mexico School of Law for four years.

4. It is the position of the United States that, under customary international law, sovereign warships and their remains which are identifiable as to the flag State of origin are, unless captured prior to their sinking in armed conflict, entitled to recognition and protection as property of the flag State, unless title to the vessel has been expressly abandoned by the flag State of origin.

5. For example, in 1987 the Department of State asserted to the Government of France that title to the warship ALABAMA of the former Confederate States of America, which had been sunk in 1864 by USS KEARSARGE in battle off Cherbourg, France, vested in the United States Government and that the United States had never abandoned title thereto. In 1989 the Government of France abandoned its assertion of title to the ALABAMA, which was based on the fact that the wreck was found on the seabed within the French territorial sea; in 1989 France conceded that title to the ALABAMA was with the United States.

6. In 1997, the Government of France asserted its title to the warship LA BELLE, the flagship of Robert Cavelier de la Salle during his expedition in the Gulf of Mexico, which sank in 1686 and was discovered in July 1995 in Matagorda Bay south of Texas. The Government of France provided documentary evidence which established that the ship was a warship of King Louis XIV of France entrusted to Monsieur Cavelier de la Salle as part of an official mission on behalf of the King of France, title to which the Government of France has not abandoned. The United States Government is prepared to recognize France's title to the shipwreck of LA BELLE as part of an international agreement currently under negotiation with France.

7. In September 1998, the United Kingdom asserted title to an anchor which fell off the British frigate H.M.S. CONFIANCE into Lake Champlain during the Battle of Plattsburgh Bay on September 11, 1814, during the War of 1812, before the warship was captured by the United States. The United Kingdom authorized the United States to recover the anchor and place it on historical display at the Lake Champlain Maritime Museum. The United Kingdom has asserted its title to other British warships sunk in the 18th, 19th and 20th Centuries and later located in United States waters. The United States has recognized those claims.

8. The United States recognizes the claims of Germany to title to Nazi U-boats sunk during World War II and located in United States waters.

9. As the foregoing examples illustrate, it is the policy of the United States Department of State to recognize claims by foreign governments – such as in this case by the Government of Spain regarding the warships JUNO and LA GALGA – to ownership of foreign warships sunk in waters of the United States without being captured, and to recognize that title to such sunken warships is not lost absent express abandonment by the sovereign.

10. Further, I have examined the provisions of the Treaty of Friendship and General Relations between the United States of America and Spain signed at Madrid July 3, 1902, 33 Stat. 2105, Treaty Series 422, 11 Bevans 628. The records of the Treaty Office of the Department of State show that this treaty entered into force April 14, 1903, and remains in force between Spain and the United States.

11. Article X of this treaty provides:

> In cases of shipwreck, damages at sea, or forced putting in, each party shall afford to the vessels of the other, whether *belonging to the State* or to individuals, the same assistance and protection and the same immunities which would have been granted to its own vessels in similar cases.

(Emphasis added.)

12. Through its Embassy's Diplomatic Note No. 43/98, dated May 8, 1998, Spain has requested the United States to ensure recognition of Spain's ownership of these wrecks and associated artifacts, which have not been abandoned by Spain, to ensure that the remains of these vessels are treated as maritime graves, and to ensure that their salvaging not be authorized at this time.

13. Article X, by the broad scope of its terms ("in cases of shipwreck"), is applicable to ships sunk before as well as after 1902. Because it is not expressly limited to vessels which might sink in the future, under its literal terms, it therefore applies to vessels already sunk in 1902 that otherwise come within the terms of Article X. Its application, however, is necessarily prospective. I understand that this provision is unique in that no other treaty of friendship, commerce and navigation (FCN) treaty of the United States contains such a broadly worded provision applying to State ships entitled to sovereign immunity. It

should be noted that the comparable provision in the 1795 Treaty of Friendship, Limits and Navigation between Spain and the United States, 8 Stat. 138, T.S. 325, 11 Bevans 516, article X, does not expressly mention State ships.

14. It is in the foreign policy interest of the United States to honor the request of the Government of Spain. It is the opinion of the undersigned that Article X requires application of the principles of sovereign ownership ("the same ... protection and the same immunities"), which exist under customary international law, as set forth above. Further, Article X imposes on the United States the responsibility to afford to these Spanish vessels the same assistance and protection and the same immunities which would be granted to sunken United States warships in the same location.

15. It is the view of the U.S. Department of State that U.S. domestic law is consistent with the customary international law rule that title to sunken warships may be abandoned only by an express act of abandonment. Under the Constitution of the United States as interpreted by the Courts of the United States, it cannot be presumed that the U.S. Government has abandoned its sunken warships.

16. The Legislative and Executive Branches of the United States Government have also acted in accordance with the view that title to sunken warships may be abandoned only by an express act of abandonment. Through the Abandoned Shipwreck Act, 43 U.S.C. sec. 2101 *et seq.* (1994) ["ASA"], the United States asserted title to certain *abandoned* shipwrecks (sec. 2105(a)) and transferred said title to the States (sec. 2105(c)). In providing the views of the Department of State to the Chairman of the House Committee on Merchant Marine and Fisheries on S. 858, entitled the "Abandoned Shipwreck Act of 1987", the Assistant Secretary of State for Legislative Affairs wrote "the U.S. only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act; mere passage of time or

lack of positive assertions of right are insufficient to establish such abandonment." (Letter of J. Edward Fox to the Hon. Walter B. Jones, Feb. 19, 1988, reprinted in House Rep. 100-514, Part 2, 100th Cong., 2d Sess., at 13.) The House Committee on Interior and Insular Affairs agreed in its report No. 100-514, Part I, pp. 3-4, Mar. 14, 1988 ("The Committee notes that the United States only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act. Passage of time or lack of positive assertions of right are insufficient to establish such abandonment."). These limitations are included in the National Park Service's Abandoned Shipwreck Act Guidelines, vol. 54, Federal Register, No. 63, April 4, 1989, pp. 13642 *et seq. passim*. In consonance with the foreign policy and treaty responsibilities of the United States as stated above, the term "abandoned" when applied in reference to both foreign and U.S. warships is to be given its customary meaning in both international and domestic law, as requiring an express abandonment. Thus foreign warships which have not been expressly abandoned are outside the purview of the ASA.

17. In light of the foregoing, the United States recognizes:

a. the international law rule that warships and their associated artifacts, whether or not sunken, are entitled to sovereign immunity.

b. that sunken warships are historical artifacts of special importance and entitled to special protections; that many have unique histories making them part of their country's traditions; and that they may be the final resting places of persons who died in the service of their nations.

c. that the practice of nations confirms the well-established rule of international law that title to such vessels is lost only by an express act of abandonment, gift or sale by the sovereign in accordance with relevant principles of international law and the law of the flag State governing

abandonment of government property, or by international agreement or by capture or surrender during battle before sinking.

d. that, absent an express act of abandonment, a coastal State (such as the United States) does not acquire any right of ownership to a sunken warship by reason of its being located on or embedded in the sea-bed over which it exercises sovereignty or jurisdiction, and a State of the United States does not acquire any right of ownership to a sunken warship by reason of its being located on or embedded in the sea-bed to which the State was given certain rights by the Submerged Lands Act, 43 U.S. Code sec. 1301 *et seq.*, and the Abandoned Shipwreck Act, 43 U.S. Code sec. 2101 *et seq.* (1994), although access to such vessels is subject to coastal State control in accordance with international law.

e. that, absent an express act of abandonment, no person or State may salvage or attempt to salvage sunken warships or their associated artifacts, wherever located, without the express permission of the sovereign flag State, whether or not the vessel is a war grave.

f. that sunken warships containing crew remains are entitled to special respect as graves and must not be disturbed without the explicit permission of the sovereign.

18. Adherence to these principles is of great importance to the United States, which has nearly 3,000 sunken warships located around the globe, some 1,300 in U.S. waters and over 1,500 in foreign and international waters. If the United States does not grant such protection and immunities to U.S. or foreign warships sunk in its own waters, it would expect difficulties in seeking those same protections and immunities for sunken U.S. warships in foreign or international waters. In particular, if the United States does not protect the wrecks of the Spanish warships JUNO and LA GALGA as requested by Spain it could be expected that Spain would not be prepared to protect sunken U.S. warships discovered in

Spanish waters. Further, the Congress of the United States has recognized that it is in the public interest to preserve our national maritime heritage. 16 U.S.C. sec. 5401.

19. A previous opinion of the Deputy Legal Adviser of the Department of State given in 1980 to the same effect, relating to sunken World War II Japanese warships, appears in the DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1980, pages 999-1006 (Marian Nash Leich ed., Dep't of State Pub. 9610, 1986).

20. A portion of the memorandum attached to that opinion (pages 1003-1004) cites a number of older cases, the oldest of which involved a British frigate sunk in 1781 or 1782 in New York waters, for the proposition that abandonment of title to warships may be express or implied. The memorandum also states:

> The practice of the U.S. and other countries in recent years has been to depart from the earlier view that abandonment of a warship could be implied by the long passage of time (the premise, for example, in [the case involving this 18th Century British frigate]). Factors such as an increased reluctance to abandon title to U.S. government property, including vessels that have become, in many situations, the final resting place of military personnel, as well as the existence of more sophisticated methods of salvaging vessels and communicating decisions to abandon vessels, have in effect resulted in a demise of the earlier view. In the absence of an express transfer or abandonment of a U.S. warship sunk in the near past (*e.g.*, in the World War II era), it should be presumed that title to such vessels remains in the U.S. Title to vessels sunk in the more distant past (such as during

> the 17th and 18th centuries) would, of course, still be determined by the more conventional interpretation of that period.

21. The last sentence of this quotation does not state current U.S. policy and is not consistent with the current practice of the United States and other countries. The procedures for the abandonment of sunken U.S. warships located outside the territory of the United States, set forth in 10 U.S. Code sec. 7305-7308 and 7545 (1994) and implementing regulations 32 C.F.R. parts 172 and 736 (1997), and for other U.S. vessels in 40 U.S. Code sec. 484(i) (1994) and 46 U.S. Code App. sec. 1158 (1994), make no provision for implied abandonment or impose any limitation as to the age of U.S. property. The practice of the United States and other countries since 1980 with regard to "vessels sunk in the more distant past" is now consistent with that related to "warships sunk in the near past", *i.e.*, their abandonment is not to be presumed or implied, but must be express. *Accord* Gerald J. Mangone, UNITED STATES ADMIRALTY LAW 225 (Kluwer, 1997) ("U.S. warships, for example, sunk and untouched for more than a century, will not be considered as abandoned").

22. Neither of the two multilateral international treaties on salvage permit the salvage of sunken warships without the express permission of the flag State. The 1910 Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea (the Brussels Convention), 37 Stat. 1658, T.S. 576, 1 Bevans, 780, is expressly not applicable to warships, as Article 14 thereof provides "This convention does not apply to ships of war or to Government ships appropriated exclusively to a public service". The 1989 Convention on Salvage, Sen. Treaty Doc. 102-12, Sen. Exec. Rep. 102-1, similarly provides in Article 4, State-owned vessels, that "1. . . . this Convention shall not apply to warships or other non-commercial vessels owned or operated by a State and entitled, at the time of salvage operations, to

sovereign immunity under generally recognized principles of international law unless the State decides otherwise." These multilateral treaties are but two of the more than 50 treaties in force that recognize the sovereign immunity of warships. Most of these treaties are listed in ROACH & SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 466-471 n.45-67 (Kluwer 2d ed. 1996).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 18th day of December 1998, in Washington, D.C.

/s/ Mary Beth West

Ambassador Mary Beth West
Deputy Assistant Secretary
(Oceans, Fisheries and Space)
United States Department of State

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

SEA HUNT, INC.,

Plaintiff,

v.

THE UNIDENTIFIED SHIPWRECKED VESSEL OR VESSELS, their apparel, tackle, appurtenances, and cargo located within coordinates 38 degrees 01'36" North Latitude, 75 degrees 14'33" West Longitude; 37 degrees 57'21" North Latitude, 75 degrees 13'00" West Longitude; 38 degrees 01'36" North Latitude, 75 degrees 13'14" West Longitude; 37 degrees 57'33" North Latitude, 75 degrees 17'14" West Longitude and/or 37 degrees 55'00" North Latitude, 75 degrees 19'18" West Longitude; 37 degrees 54'09" North Latitude 75 degrees 17'00" West Longitude; 37 degrees 51'21" North Latitude, 75 degrees 18'52" West Longitude, 37 degrees 51'20" North Latitude, 75 degrees 21'05" West Longitude, *in rem*,

Defendant(s).

Case No. 2:98cv281

STATEMENT OF INTEREST OF THE
UNITED STATES DEPARTMENT OF DEFENSE

Rear Admiral John D. Hutson, Judge Advocate General's Corps, United States Navy, deposes and says under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am the Judge Advocate General of the Navy, and I also serve as the Department of Defense Representative for Ocean Policy Affairs. I make the statements herein on the basis of personal knowledge or information made known to me in the course of my official duties.

2. In my capacity as Judge Advocate General of the Navy, I am responsible for providing legal and policy advice to the Secretary of the Navy on admiralty, maritime, and international law. As the Department of Defense Representative for Ocean Policy Affairs, I serve as the central point of contact and represent the Department of Defense in international and interagency negotiations for matters involving the law of the sea and related ocean policy.

3. Based on official records, the Naval Historical Center currently estimates that 3,000 U. S. Navy vessels lie submerged around the world. Of these, as a very rough estimate, approximately 1,500 vessels are believed to lie in the territorial seas of foreign nations or in international waters. Many of those vessels were lost in World War II.

4. Additionally, approximately 15,000 Navy aircraft lie submerged around the world. Of these, approximately 5,000 lie in foreign or international waters. The legal issues regarding salvage of these aircraft are substantially the same as those involved in vessels and the following arguments apply to them at least to the degree they do to vessels. Specific reference to aircraft is omitted in the following discussion only due to the limited scope of the instant litigation. The large number of submerged aircraft and the comparative ease with which submerged aircraft can be recovered highlights the importance of a correct resolution of these issues.

5. The protection of sunken or submerged vessels from unauthorized salvage, theft, dismemberment, destruction, or disturbance is of high importance to the Department of Defense. Many such vessels are war graves, or are the final resting places of United States service members. As such, submerged vessels are due the same deference as a national cemetery. Some of the vessels or their equipment or cargo are of continuing monetary value. A few still contain classified information or features relevant to the national

security. Many such vessels are of significant cultural importance, often representing unique repositories of artifacts emblematic or instructive of national or maritime history. Many submerged naval vessels also contain unexploded ordnance, which may pose severe dangers to those visiting them. Further, many submerged vessels also contain lead, oil, asbestos, or other materials, which may pose an environmental hazard if released into the environment through disturbance of the site. Efforts to exploit these sites need to be carefully controlled.

6. United States policy has consistently been that these sunken sovereign vessels remain the property of the United States absent the government's formal, affirmative abandonment, sale or donation of ownership, pursuant to Act of Congress and implementing regulations. *See, e.g., Hatteras, Inc. v. U.S.S. Hatteras*, 1984 A.M.C. 1094 (S.D. Tex. 1981), *aff'd mem.* 698 F.2d 1215 (5th Cir. 1983). This policy has been sanctioned by federal court rulings, and it applies regardless of condition, location, or date of sinking of the vessel. The United States maintains title to such vessels regardless of the circumstances of the sinking, which may include intentional scuttling, sinking after the crew has abandoned ship for lifesaving purposes, or sinking during use as a target. The policy of perpetual ownership facilitates government supervision of these wrecks and serves the United States Government's and the public's interests in preserving the sanctity of service members' graves, preserving historic cultural resources, maintaining the government's fiscal and property interests, and protecting the public against the potential dangers posed by unexploded ordnance and environmental degradation.

7. Consistent with its other interests the Navy's policy generally has been to allow open access to U.S. Navy wreck sites for recreational divers, at the divers' own risk, so long as the site is not disturbed – "Look but don't loot" – and so

long as access does not involve risks to personal safety, military security, or the environment.

8. It is the policy and practice of the United States to allow such vessels to remain where they lie until such time as it is in the government's interest to recover them in their entirety or in part or to exploit them for the sake of historical or archaeological study. Because of limitations at any one time on the availability of funding to conduct exploration and/or salvage to curatorial standards and limitations on technology required to accomplish such operations consistent with the government's and public's long-term interests, it is the U.S. Government's practice to cautiously consider any proposed action with respect to such wrecks. Because of variables such as water depth, proximity to land, the degree to which a submerged craft is embedded in the sea bottom, and the date of the sinking, it is not possible to predict, with any degree of certainty, just how much it would cost the United States to salvage or to demonstrate affirmative control over submerged vessels by physically preventing their disturbance. To permit salvage of such vessels without the government's prior authorization would either put those wrecks and sites in serious danger or compel the government to expend immense sums to effect preemptive recovery or to attempt to enforce affirmative control as the means to deny salvage. For the United States policy to be effective, United States title and control with respect to such wrecks must be of indefinite duration.

9. Because a large number of wrecked United States Government vessels are in foreign or international waters, it is in the United States interest that other sovereign nations recognize the United States perpetual interests in its wrecks. A clear inducement for other nations to do so is the United States and its constituent States reciprocal recognition of the sovereign title and ownership interests of other sovereign governments in their wrecks in United States waters. To that end, requests of private individuals or entities for permission

to salvage foreign sovereign vessels sunk, without capture, in United States waters are routinely referred to cognizant foreign state owners. United States failure to recognize such foreign sovereign interests will make it less likely that other nations will recognize the United States interests in its wrecks in their waters.

10. Reciprocal recognition of sovereign rights is emerging as customary international practice. For example, the Department of State negotiated a bilateral agreement with France regarding the remains of the C.S.S. Alabama, a Confederate warship that was sunk off Cherbourg in 1864 by U.S.S. Kearsarge. By that agreement France recognized U.S. title to the wreck and both nations agreed to cooperate in the investigation, protection, and eventual recovery of the wreck. Inherent in such negotiations is the good-faith understanding that, when roles are reversed, the United States will recognize appropriate foreign sovereign claims and will take reasonable measures to protect foreign sovereign property.

11. The Department of Defense has a strong interest in ensuring that the *Juno* and *La Galga* are treated in the same way that we would want U.S. Navy, U.S. Army, U.S. Air Force and other submerged sovereign, non-commercial United States wrecks in foreign waters to be treated.

FURTHER AFFIANT SAYETH NOT.

Executed this 18th day of December 1998, under penalty of perjury pursuant to 29 U.S.C. § 1746.

/s/ John D. Hutson
JOHN D. HUTSON
Rear Admiral
Judge Advocate General's Corps
United States Navy

[Embajada de España]

UNOFFICIAL TRANSLATION

VERBAL NOTE

No. 43/98

The Embassy of Spain presents its compliments to the Department of State and, regarding the request presented by the company Sea Hunt Inc. before the Federal Court of the State of Virginia concerning the salvaging of the vessels believed to be Juno and La Galga, has the honor to inform:

1) The vessels Juno and La Galga and their associated artifacts are the property of Spain, who has never acted in a manner that would expressly or tacitly signify their abandonment. The relevant historical documentation will be presented shortly.

2) It is Spain's wish that the remains of these vessels be treated as maritime graves and that their salvaging not be authorized at this time.

3) In accordance with article 10 of the Treaty of Friendship between Spain and the United States signed in 1903, the Embassy of Spain requests that the competent authorities take the necessary steps to ensure the above including those related to the Federal Court of the State of Virginia involved, and grant to these vessels the same assistance, protection and immunities that shipwreck property of the United States would merit.

Her Majesty's Government would be grateful if the Department of State could convey these views to the court.

The Embassy avails itself of this opportunity to renew to the Department of State the assurance of its highest consideration.

BRITISH EMBASSY/WASHINGTON (SEAL)

[Dated: July 7, 1999]

[Embajada de España]

UNOFFICIAL TRANSLATION

VERBAL NOTE

Num. 60/99

The Embassy of Spain presents its compliments to the Department of State and in relation to the Department of State Verbal Note of today, has the honor to refer to the proceedings concerning the Spanish Navy Frigate "La Galga" in the United States Distric [sic] Court of the Eastern Distric [sic] of Virginia. By previous communications, the Department of State has been informed that H.M. Frigate "La Galga" was a serving vessel of the Spanish Navy engaged on active duty at the time of her sinking as escort to a convoy of vessels en route from Mexico to Spain.

In the above-referenced proceedings, the judge has entered an order of April 27, 1999 stating that H.M. Frigate "La Galga" ceased to be the property of Spain by virtue of the Definitive Treaty of Peace between France, Great Britain and Spain on 10 February 1763 and in particular the provisions of Article XX in which an exchange of certain territory with Great Britain was effected between Spain and Great Britain. The Embassy of Spain desires by this Note to affirm to the Department of State Spain's interpretation and understanding of the Treaty of 1763 and to express its agreement with Note Number 41 of Her Britannic Majesty's Embassy on the same subject.

In view of the above-referenced order, the Embassy of Spain reaffirms its view that Article XX of the 763 [sic] Treaty was not a cession or abandonment of H.M. Frigate "La Galga" or other shipwrecked vessels of Spain. Article XX was also not a cession of shipwrecked vessels or other

state property situated on the seabed, a subject which is not addressed in Article XX. It should also be noted in this connection that Article XX includes specific reservation of continued ownership and rights of removal with respect to Royal effects and other moveable Royal property, such as H.M. Frigate "La Galga". This reservation has no expiration or other time limitation, in contrast to specific time periods designated for carrying out other undertakings of the Treaty. The Embassy of Spain further notes that the principle of sovereignty and non-interference with state vessels was specifically recognized in the 1667 Treaty of Madrid between Spain and Great Britain and was reaffirmed to the fullest extent in Article II of the 1763 Treaty.

The Embassy of Spain takes this opportunity to renew to the Department of State its expression of appreciation for the United States for its assistance and support in recognizing the principles of sovereignty with respect to state vessels and in the protection of the remains of those who died in the service of their country and to renew to the Department of State the assurances of its highest consideration.

Washington, DC, July 8 1999

LEGAL BUREAU
SPANISH DESK
WASHINGTON, D.C.